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# · HOUSING ·

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# LEGAL DIGEST

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NUMBER 71

JUNE 1940

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"I believe that adequate housing in the areas where defense industries are expanding or are soon to expand is essential to the success of our defense program. . . .

"To those citizens who, in following the progress of our national-defense program, tend to think in terms of planes and guns only, I would like to say this: Adequate defense means a mobilization of all our industrial forces. It means dozens of other things besides armaments. And high on the list of these other things are decent homes for Americans, homes worth fighting for, homes in which the defense industry worker or the sailor at his naval base can live a normal, healthy life."

ELBERT D. THOMAS,  
*U. S. Senator from Utah*

*Radio Address  
June 13, 1940*

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
THE CENTRAL HOUSING COMMITTEE, WASHINGTON, D. C.

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#### ANNOUNCEMENT

The Editorial Board of the HOUSING LEGAL DIGEST  
announces that the July and August issues  
(Nos. 72 and 73) will be combined in a single  
issue to be published during August.



## DECISIONS

BANKRUPTCY - FRAZIER-LEMKE ACT - PROCEDURE

(Borchard et al v. California Bank and California Trust Co., - U. S. No. 752, May 20, 1940)

Sale of property contrary to provisions of the Bankruptcy Act will not be approved. Procedure required by the statute must be followed in order not only to give relief to the debtor but to protect the interests of the creditor.

The question presented in this case is whether a bankruptcy court may permit foreclosure of mortgage liens where the procedure prescribed by section 75 (s) of the Bankruptcy Act, as amended, has not been followed.

In holding that this could not be done, the Supreme Court of the United States, through Justice Roberts, said:

"We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of s 75 (s). That this is so is made plain by our decisions in Wright v. Vinton Branch of Mountain Trust Bank, supra, and John Hancock Ins. Co. v. Bartels, 308 U. S. 180. As was said in the latter case (p. 187):

"The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved."

"That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act. As a prerequisite to an intelligent determination of the terms under which the debtor is to remain in possession, the statute requires that the court and the parties shall be informed of the fair value of the property. As pointed out in the Wright case, supra, the secured creditors' rights are protected to the extent of the value of the property. The court may order rent to be paid by the debtor, may order him to make payments on account of principal, and, in its continuing control over the property, may enter any other orders for the protection of the debtor and secured creditors which the situation requires. Failure of the debtor to comply with any such orders may eventuate in a sale.

"Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course. By written stipulations the bank consented to the retention of possession by the debtors and arranged that they should cooperate in the cultivation of the farm, proceeds of the crops being used for further cultivation and conservation of the real estate, for payment of taxes, and for payments to the debtors. For more than thirty-one months after the petition for appraisal was filed no action was taken. An appraisal was thereafter made. No stay order has been entered fixing terms on which the debtors are to remain in possession. The petitioners were entitled to compliance with the procedure required by the statute. The bank, at any time, could have obtained action by the Conciliation Commissioner and the court, in accordance with the statute. It cannot now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens.

"The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion."

#### BANKRUPTCY - PRIORITIES

(Korman v. Federal Housing Administrator, U. S. Court of Appeals for District of Columbia, June 3, 1940)

The FHA is entitled to priority in a bankruptcy claim where the note which was assigned to the FHA was assigned prior to the filing of the bankruptcy petition.

This case is an appeal from a judgment of the District Court confirming an order of a referee in bankruptcy granting a preferred status to a claim held by the FHA.

The debtor secured a loan from a bank which was insured by the FHA. The debtor defaulted in his payments and the FHA paid the bank the balance due on the note and received an assignment of the same "to the Federal Housing Administrator acting on behalf of the United States of America". Later the debtor filed a petition in bankruptcy and was adjudicated a bankrupt. In the name of the United States, the Administrator filed a claim on the note for which he sought the priority accorded "debts due to the United States" under R. S. 3466, which priority was allowed by the referee in bankruptcy and the District Court. This appeal was then taken and the decision of the Court of Appeals for the District of Columbia is as follows:



"In *United States v. Marxen*, 307 U. S. 200, the Supreme Court held that where assignment of the claim was made after the petition in bankruptcy had been filed, the Federal Housing Administration can assert only the right of its assignor, 'for the reason that the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy'. Had the assignment of the note in the instant case taken place after the bankruptcy petition was filed, the rule of the *Marxen* case would foreclose the issue. It is clear from the record, however, that the debtor's negotiable note was irrevocably assigned to the Administrator prior to the filing of the petition. Thus the question presented here is whether the claim held by the Federal Housing Administration, at the time the petition was filed, is a 'debt due to the United States' within the meaning of R. S. § 3466. In accord with the decision of the Eighth Circuit Court of Appeals in *Wagner v. McDonald*, 96 F.(2d) 273, we are of the opinion that the question must be answered in the affirmative.....

"It is first contended by the appellant that a note assigned by a private creditor to the United States is not a 'debt due to the United States' within the meaning of R. S. § 3466. Underlying this contention is the theory that, even in respect to assignments made prior to institution of bankruptcy proceedings, no assignee can acquire a greater right than that possessed by his assignor. However true that may be of assignments between private persons and institutions, Congress has enacted a different rule governing assignments to the United States. Without qualification, R. S. § 3466 prescribes priority for 'the debts due to the United States'. In this broad language there is nothing to warrant distinction between original and assigned credits, and there is nothing in the Bankruptcy Act or other acts of Congress suggesting such a distinction. It has been uniformly held that a note assigned to the United States by a private institution is a debt due to the United States within the meaning of this section. [citing cases] This claim on the note assigned to the Administrator, prior to the institution of bankruptcy proceedings, must therefore be accorded priority under R. S. § 3466, if a debt due to the Federal Housing Administration, acting on behalf of the United States, is to be regarded as a debt due to the United States.

"We come then to appellant's second contention that this debt is not to be so regarded. In the very recent case of *United States v. Summerlin*, - U. S. - , (No. 715, decided May 27, 1940) the Supreme Court unanimously held that a claim assigned to the Federal Housing Administrator acting on behalf of the United States was not subject to a state limitation statute for the reason that it was 'the claim of the United States'. Although this might seem decisive of the instant case, it appears from earlier decisions of the Court that additional considerations may be involved in determining whether the claim of a governmental agency is entitled to priority under R.S. § 3466..... It is that question which is here presented."

"It is obvious that the Federal Housing Administration is an agency of the United States and its claims are therefore entitled to governmental priority in bankruptcy proceedings, unless there has been some affirmative indication by Congress to the contrary.....

"It is significant to note that the Supreme Court has found such Congressional intent in but two classes of cases. It has appeared in some of the cases that according debts due to the United States priority would conflict with an expressed Congressional policy. Thus priority was refused 'to the Director General of Railroads because § 10 of the Federal Control Act manifested an intention that the carriers under federal control should be treated as before their transfer to federal operation. The United States itself when it sought priority for its loans under the Transportation Act was denied the benefits of § 3466 because the intention to build up the credit standing of the railroads was inconsistent with the claimed priority.' So, in *United States v. Marxen*, supra, a claim acquired by the United States from a private institution after the debtor filed a petition in bankruptcy was denied priority because 'the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition.' In the instant case, however, according the claim of the Federal Housing Administration priority, far from contravening an expressed policy of Congress, would seem to further the objectives of the National Housing Act.

"The second class of case wherein the Supreme Court has found evidence of Congressional intent that debts due an agency of the United States are not to be accorded governmental priority involved agencies with a separate corporate personality.

"With no suspicion of a corporate identity, as constituted by Congress, the Federal Housing Administration is merely an administrative unit of government. However, the appellant argues that provision for suit by and against the Administrator in his official capacity indicates Congressional intention that the Federal Housing Administration is to be regarded as a separate legal entity whose claims are not to be accorded governmental priority.

"Congress has expressly provided by this language only that the immunity of the sovereign to suit should not be asserted in respect to the administration of the Federal Housing Administration. As a matter of convenience, the Administrator was authorized to appear in his official capacity as the champion of its rights. In this there is no express waiver of other legal prerogatives of the sovereign and it is not always sound to assume that Congress intended to do that which it did not."

"We are of the opinion that provision for suit by and against the Administrator in his official capacity does not indicate Congressional intention to withdraw claims of this agency from the protection of R. S. § 3466.



For this view we find support not only in the limited nature of the provision itself and the Committee Report concerning it, but, as well, in decisions of the Supreme Court recognizing that the sovereign may appear in court and assert its prerogatives through a governmental agent acting in his official capacity.

"We conclude that the claim filed by the Administrator in behalf of the United States, is entitled to the priority accorded debts due to the United States. The order of the District Court must, therefore, be affirmed."

CONSTITUTIONAL LAW - BUILDING AND LOAN ASSOCIATIONS - STATUTES  
(Klein v. Jefferson County Building & Loan Ass'n., - Ala. -, 195 So. 593).

Building and Loan Associations are quasi public institutions and may be regulated by the legislature as experience shall dictate in the common interest. The Alabama "Savings and Loan Act" of 1939 is constitutional insofar as certain features are concerned.

This was a proceeding under the Declaratory Judgment Act by William J. Klein, a stockholder in the Jefferson County Building & Loan Association against said association to test the constitutionality of certain features of the Alabama "Savings and Loan Act", approved September 21, 1939, Gen. Acts 1939.

The above association was, for many years, actively engaged in conducting a Building and Loan Business, but having acquired a great number of pieces of real estate by foreclosure of mortgages given by borrowers had not, in recent years, been engaged in making loans or taking money from depositors, but had been collecting its outstanding mortgages and selling its real estate. Its shareholders voted to reorganize a new corporation, under the provisions of Section 46 $\frac{1}{2}$  of the new Act, to take over the assets of the existing association. The plaintiff declared that the association was not in a position to qualify and be converted into a "Savings and Loan Association" under the new act. He prayed for a declaratory judgment adjudicating whether or not:

"1. Said Act of the Legislature of Alabama is constitutional insofar as the provisions of Article 9, and in particular Section 46 $\frac{1}{2}$  thereof, are concerned;

"2. Whether or not said new corporation can be formed under either or both of the methods provided for in Section 46 $\frac{1}{2}$ ;

"13. Whether or not, if said new corporation is formed under the second method provided for in said Section 46 $\frac{1}{2}$ , such new corporation will be vested by operation of law with title to all of the property and assets owned by said Association at the time of the formation of said new corporation without the necessity of the execution and recording of a formal conveyance of such property and assets by Association to said new corporation."

The trial court answered "Yes" to all of the above inquiries, and in so upholding the constitutionality of the Act stated:

"Touching inquiry No. 1, the constitutionality of Article 9, and particularly Section 46 $\frac{1}{2}$  of the 'Savings and Loan Act,' are challenged on the ground that these provisions are not germane to the subject expressed in the title of the Act, and, therefore, violative of Section 45 of our Constitution.

"The title of the Act is quite inclusive.

"The subject of legislation is the creation, operation, supervision, termination and regulation of all associations accepting monies from the public for the promotion of thrift and the financing of homes; the operation, supervision, termination and regulation of all corporations heretofore incorporated under the laws of this State for the conduct of the same business.

"It is designed to cover this field of legislation, repealing pre-existing statutes pertaining to Building & Loan Associations.

"The body of the Act looks to the future conduct of this business by 'Savings and Loan Associations,' whose creation, management, supervision, final termination and liquidation are set forth in much detail, designed, among other things, to give holders of accounts the protection of insurance by the Federal Savings and Loan Insurance Corporation.

"The Act makes provision for Building and Loan Associations incorporated and operating under former statutes to qualify and be converted into Savings and Loan Associations.".....

"Section 46 $\frac{1}{2}$ , inserted by amendment, empowers such Building and Loan Associations, with the consent of the holders of two-thirds of the book value of outstanding stock, to form a corporation under the general corporation laws of the State and merge the Building and Loan Association into such new corporation on specified conditions.



"Said Section 46 $\frac{1}{2}$  provides, in the alternative, that the Building and Loan Association may become a new body corporate in a manner therein specified.

"Such new body corporate shall by operation of law be vested with title to all the assets, real and personal, of the parent association.

"The new corporate entity to be set up under either alternative of Section 46 $\frac{1}{2}$  is not to engage in a Building and Loan Business. They are designed to be liquidating agencies set up by those interested in the assets to be liquidated, rather than under the conservator and receivership features of the Act.

"The liquidation of an association, which has gone out of business and the distribution of its assets among those entitled thereto, is a natural feature of such legislation, and provisions to that end, deemed advisable by the Legislature, are germane to the subject expressed in the title of this Act. Neither Article 9, nor Section 46 $\frac{1}{2}$  as a part of this Article, is violative of Section 45 of the Constitution. *Ballentyne v. Wickersham*, 75 Ala. 533; *First Nat. Bank of Eutaw, v. Smith*, 217 Ala. 482, 117 So. 38; *Heck, State Comptroller v. Hall et al.*, 238 Ala. 274, 190 So. 280; *Yeilding et al. v. State ex rel. Wilkinson*, 232 Ala. 292, 167 So. 580; *Lindsay v. United States Savings Association et al.*, 120 Ala. 156, 24 So. 171, 42 L.R.A. 783.

"Touching inquiry No. 1, a further question is raised as to Legislative Power to put out of business corporations legally organized and in business before the passage of this Act upon failure of such associations to qualify under the new Act. No authority is cited in support of such contention.

"This Jefferson County Building and Loan Association was admittedly chartered since Article XIV, Section 10, Constitution of 1875, now Section 238, became a part of our State Constitution.

"The power to amend or repeal corporate charters, preserving a right of control by the creator over his creature, was thus written into charters thereafter granted. Building and Loan Associations are quasi public institutions. This furnishes the occasion for legislative regulation as experience shall dictate in the common interest. *Skinner's Alabama Constitution*, § 238; *Alabama Traction Co. et al. v. Selma Trust & Savings Bank*, 213 Ala. 269, 104 So. 517; *Mayor, etc., of Mobile v. Stonewall Insurance Company*, 53 Ala. 570; *Randle v. Winona Coal Co. et al.*, 206 Ala. 254, 89 So. 790, 19 A.L.R. 118; 9 Am.Jur. p. 101, § 8; 13 Am. Jur. p. 233, § 90; 12 C.J.S., Building and Loan Associations, p. 406, § 7 b; 19 C.J.S., Corporations, p. 1428, § 1654.

"It is implied, as of course, that the corporate agencies set up under Section 46 $\frac{1}{2}$  shall undertake, as part of their purpose, a lawful liquidation, in which the property rights of all parties in the assets liquidated shall be conserved.

"It is within legislative power to authorize the disposition of all the corporate assets by consent of stockholders holding two-thirds in value. It is not essential there should be unanimous consent. The rights of minority stockholders are to be protected the same as majority stockholders. *Maben v. Gulf Coal & Coke Co. et al.*, 173 Ala. 259, 55 So. 607, 35 L.R.A., N.S., 396; 12 Am. Jr. p. 1113, § 1216; Note 79 A.L.R. 626; 19 C.J.S., Corporations, 1414, § 1642.

"There was no want of legislative power to insert in Section 46 $\frac{1}{2}$  the following provision:

"The new body corporate shall by operation of law be vested with all the property and assets of such Building and Loan Association." *Carpenter et al. v. First Nat. Bank of Birmingham*, 236 Ala. 213, 181 So. 239; 13 Am. Jur. 1099, § 1196.".....

Justice Brown dissented with Chief Justice Anderson concurring in this dissent.

#### CONSTITUTIONAL LAW - HOMESTEADS - CONTRACTS

(*Daniel et ux v. Thigpen*, - La. -, 194 So. 6)

The rule is now settled that a constitutional or statutory provision establishing or materially increasing a homestead exemption is within the federal prohibition of laws impairing the obligation of contracts in so far as it relates to debts contracted before its adoption.

Plaintiffs' (husband and wife) property was being advertized for sale under execution of a moneyed judgment obtained by defendant First National Bank. Plaintiffs claim right to have exempt from the seizure and sale a homestead consisting of two mules and 160 acres of land, and to have the defendants enjoined from selling the same unless the sale thereof realized more than the amount of \$4000, as provided by an amendment to the Louisiana State Constitution, adopted November 8, 1938. They further prayed that in the event they are not entitled to the exemption of \$4000 as provided by the amendment then they should, in the alternative, have an injunction of the sale of 130 acres of land and two mules, unless the property brings more than \$2,000 at the proposed sale. The judgment of the



lower court granted to plaintiffs their alternative demand, and rejected their claim under the amendment to the Louisiana constitution as stated above. From this decision plaintiffs have appealed, and the Supreme Court of Louisiana affirmed the decision of the lower court.

The question for consideration is whether or not the adoption of the amendment to the Constitution increasing the value of the homestead exemption allowed the debtor from \$2,000 to \$4,000 subsequent to the incurring of the contractual obligation between the plaintiff and the defendant bank is in violation of the Constitution of the United States, Article I, Section 10, U. S. C. A. prohibiting any state from passing any "law impairing the Obligation of Contracts."

The Court held that this was an amendment which impaired the obligation of contracts and said:

"Although there are a few early decisions to the contrary, the rule is now settled that a constitutional or statutory provision establishing or materially increasing a homestead exemption is within the federal prohibition of laws impairing the obligation of contracts in so far as it relates to debts contracted before its adoption.....On the other hand, such exemption laws have been held valid where the property involved was already exempt under a law in force at the time the contract was executed, or where the value of the property actually selected was not greater than was allowed by such earlier law.....' 16 Corpus Juris Secundum, Constitutional Law, § 390, p. 839. See, also, Blouin v. Ledet, 109 La. 709, 33 So. 741; Succession of Clement, 146 La. 385, 83 So. 664, reversed on other grounds; Bank of Minden v. Clement, 256 U.S. 126, 41 S.Ct. 408, 65 L.Ed. 857; Gunn v. Barry, 15 Wall. 610, 21 L.Ed. 212; Edwards v. Kearzey, 96 U.S. 595, 24 L. Ed. 793; Kener v. La Grange Mills, 231 U. S. 215, 34 S.Ct. 83, 58 L. Ed. 189; In re Fox, D. C. Cal., 16 F. Supp. 320; Rieger v. Wilson, 102 Mont. 86, 56 P. 2d 176; Medical Finance Ass'n. v. Wood, 63 P. 2d 1219, 20 Cal. App. 2d, Supp., 749; Herrington v. Godbee, 157 Ga. 343, 121 S. E. 312.

"Moreover, under the express provisions of Section 2 of Article XI of the Constitution as originally written and as amended in 1938, it is provided that 'Rights to homesteads or exemptions, under laws, or contracts or obligations existing at the time of the adoption of this Constitution, shall not be impaired, repealed or affected by any provision of this Constitution, or any laws passed in pursuance thereof.....'

"The plaintiffs contended in the lower court and urge here that it was encumbent upon the defendant bank, in order to have the property claimed by them as a homestead sold, to prove that the value thereof exceeded the

amount allowed by the Constitution, which it not only failed to do, but also objected to plaintiffs showing that the value of the property did not exceed the amount fixed by the Constitution, which objection was sustained by the lower court.

"This contention is without merit. As pointed out by this court in the case of Lee v. Cooper, 155 La. 143, 98 So. 869, 870, under the provisions of Article XI, Section 1 of the Constitution of 1921, '.....the homestead exemption does not give to the beneficiary the absolute right to prevent a seizure or sale of the homestead. The exemption gives the beneficiary the right merely to require that the property shall not be sold unless for a sum exceeding \$2,000, in which event he shall have \$2,000 of the proceeds.' See, also, Jefferson v. Gamm, 150 La. 372, 90 So. 682; Andrews v. McCreary Lumber Company, 155 La. 730, 99 So. 579, 33 A.L.R. 608; Oden v. First National Bank of Shreveport, 182 La. 591, 162 So. 189."

CONSTITUTIONAL LAW - HOUSING AUTHORITIES ACTS

(Humphrey v. City of Phoenix et al. - Ariz. -, May 6, 1940)

The Arizona Municipal Housing Law (Chapter 82, Laws of 1939)  
is constitutional.

It appears that the City of Phoenix, on April 5, 1939, in pursuance of the Arizona municipal housing law, by ordinance (No. 2897), found, determined and declared that:

"(a) Insanitary and unsafe inhabited dwelling accommodations exist in the City of Phoenix, Arizona, and

"(b) There is a shortage of decent, safe and sanitary dwelling accommodations in the City of Phoenix available to persons of low income at rentals they can afford, and

"(c) There is a need for a housing authority in the City of Phoenix."

and created the Housing Authority of the City of Phoenix, consisting of five members, and delegated to such Authority the power to construct, maintain, operate and manage any housing project or projects within the City in accordance with the Arizona municipal housing law. Subsequently, on October 17, 1939, the City, by ordinance (No. 3018), delegated to its agent, the Housing Authority, all its powers under the municipal housing law except the power to borrow money, issue bonds and acquire real property.



Specifically, the Authority was given the power to look after the details of locating and acquiring sites for housing projects and the construction of the projects, and to execute all contracts and agreements required by the United States Housing Authority.

The Supreme Court of the State of Arizona held (a) that Section 8 of the Municipal Housing Law, which vests in municipal corporations the power of eminent domain to be exercised to acquire sites for proposed projects for slum clearance and to house persons of low income, is for a public purpose and within the police power of the State and is not in contravention of Section 17, Article II of the State Constitution; (b) that the Municipal Housing Law in making provision for the housing of persons of low income is not class legislation in contravention of Section 13 of Article II of the State Constitution, which prohibits "the granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations"; (c) that the Municipal Housing Law is exempting the property of the City devoted to low-rent housing, or the bonds of the City issued and sold to purchase the site for such housing, and the construction and installation thereof is constitutional in view of Section 2, Article IX of the State Constitution, which provides "That there shall be exempt from taxation all Federal, State, county and municipal property,..... Public debt, as evidenced by the bonds of Arizona, its counties, municipalities, or their subdivisions, shall also be exempt from taxation....."; (d) that the bonds proposed to be issued under authority given to cities and towns of the State by the Municipal Housing Law to acquire sites and to construct and install slum clearance projects without reference to the value of the taxable property therein, do not constitute an indebtedness of the City prohibited by Section 8, Article IX of the State Constitution, and (e) that the Municipal Housing Law is authorizing cities and towns to loan their credit to persons of low income is not in contravention of Section 7, Article IX of the State Constitution.

#### CONSTITUTIONAL LAW - MORATORIUM STATUTES

(Fouquette v. O'Brien et al. - Ariz. -, 100 Pac. 2d 979).

The Arizona mortgage moratorium statutes of 1937 and 1939 are unconstitutional, because the legislature failed to declare the existence of any emergency, social, economic or financial and the court noted that there was none existing at the time, and therefore they conflict with the provision of the Federal Constitution that no state shall pass any law impairing the obligation of contract.

Plaintiff brought an action of foreclosure against defendant. Defendant applied for a moratorium under the 1933 mortgage moratorium act and was granted same. The title and first section of the 1933 moratorium act read as follows:

"An Act Declaring the Existence of an Emergency, and Providing Procedure in Actions and Foreclosure of Real Estate Mortgages.

"Be It Enacted by the Legislature of the State of Arizona:

"Section 1. There is hereby declared to be in the state of Arizona an emergency involving the social, economic and financial welfare of the state as a whole."

The moratorium act applied for a period of two years at which time the legislature passed another act extending the provision of the act, and again in 1937 at its regular session, it passed similar legislation. At a special session in 1937 it repealed all previous legislation on moratorium and passed an act which did not state that there was an "emergency involving the social, economic and financial welfare of the state as a whole."

The Supreme Court of Arizona held that failure to declare an emergency existing in the 1937 Special Session Act made the act unconstitutional in that it conflicted with Section 10, Article 1 of the Federal Constitution in that no state shall pass any law impairing the obligation of contracts.

The court in deciding this case decided only the question of whether the act violated the provisions of the Federal Constitution. It discussed at length the case of Home Building and Loan Ass'n. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, which raised the same question as in this case. In that case the objection was raised that it violated the provisions of the Federal Constitution in regard to impairing of the obligation of contracts. The Minnesota Supreme Court, by a divided opinion, upheld the law, and the United States Supreme Court, by a four to five decision, also upheld the validity of the act.

The opinion of the court, in part, is as follows:

"The case Home Bldg. & Loan Ass'n. v. Blaisdell is a long one and quotations therefrom sufficient to fully explain and substantiate our conclusions as to its meaning would extend this opinion to unreasonable length. After a careful analysis of the case and its reasoning, we think it clearly laid down the following principles: (a) Legislation of the kind involved in the various mortgage moratorium acts under consideration unques-



tionably violates section 10, Art. I of the Federal Constitution referred to. (b) There is implied, though not expressed, within the Federal Constitution a reservation of the police power to the states, which is superior to all specific provisions of that constitution and which may be called into play in periods of great public emergency, and when so called these police powers may temporarily only suspend the exercise of the specific powers or prohibitions of the constitution. As was stated in the Blaisdell case: 'Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principal precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. See American Land Co. v. Zeiss, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And, if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes.' (Italics ours.) (c) The existence of a public emergency justifying the suspension of the ordinary constitutional limitations is primarily for the legislature, but the determination of that branch of the government is not conclusive, and whether a law depending upon the existence of an emergency ceases to operate because the emergency had ceased is always open to judicial inquiry, notwithstanding the legislative declaration. Again and again through the opinion the court emphasizes the fact in varying language that in order to justify legislation like the mortgage moratorium acts there must exist a grave public emergency in the opinion of both the legislative and judicial branches of the government, and that when, in the opinion of the latter, the emergency which justifies the act has passed, of necessity the moratorium ceases to be effective, or, as it may be more emphatically put, becomes unconstitutional so far as future use is concerned.

"Our legislature, like that of Minnesota, in 1933 declared so grave an emergency existed that it justified the calling into effect of the reserved police power of the state. In 1937 it repealed the previous law upon the subject and enacted a new one which omitted any declaration of an emergency such as was found in the original act. We think this action of the legislature is significant. The very same reasoning which caused the supreme court of the United States to take judicial notice of the existence of the actual emergency in the nation in 1933 requires us to take judicial notice of its present condition.".....

"For the reason that the legislature has failed to declare the existence of any emergency, social, economic or financial, in the act of 1937 sufficient to justify the setting aside of section 10, Art. I, supra, and that we take judicial notice that no such emergency then existed in 1937, nor now exists, we are of the opinion that the mortgage moratorium acts of 1937 and 1939 are unconstitutional as being in conflict with section 10, Art. I of the Federal Constitution."<sup>11</sup>

CONSTITUTIONAL LAW - ZONING - NUISANCE

(Hollearn et al. v. Silverman et al. - Pa. -, 12 At. 2d 292).

An equity court has jurisdiction to enjoin a nuisance. A zoning ordinance fixing the boundaries of zones did not result in a contract with plaintiffs preventing the city from subsequently changing the boundaries if the city found it desirable to change them.

Plaintiffs brought this action to restrain defendants Silverman and the officers of the City of Philadelphia "from changing the classification of the property of respondent Isadore E. Silverman.....upon the zoning map of the City of Philadelphia from Class 'A' Residential to Class 'A' Commercial" on the ground that the ordinance authorizing the change is "unconstitutional, null, void and of no legal effect whatsoever."

Plaintiffs occupy houses on adjoining lots. Alongside the lot of one of plaintiffs is the land of Silverman. Part of this land faces on Hortter Street which is the street involved in this proceeding. Further up on Hortter Street is a drug store. The drug store is in the commercial zone because the zoning area cuts through the middle of the street and leaves defendant Silverman's property as the only residential lot on the entire street. The changed zoning law would put this lot in the commercial zone. The Court in upholding this change in the zoning law said:

"Silverman has done nothing on the premises. The deed to him conveys 'Under and subject to the express condition and restriction that at no



time hereafter shall there be erected upon that portion of the property immediately hereafter described, any building of greater height than Fifteen feet from the footway of Hortter Street, nor of more than one story..... And further the remainder of the premises herein conveyed shall be under and subject to the express condition and restriction that at no time hereafter shall the present building nor any building erected hereafter upon the said lot be used for any other purpose than a private dwelling house."

"Equity has jurisdiction to enjoin a nuisance but the record contains no evidence of a nuisance. The prayer of the bill is to restrain enforcement of the ordinance of 1939 which neither prohibits plaintiffs from doing, nor requires them to do anything on their respective properties. They enjoy these as they did before. Their contention is that, if Silverman is permitted to conduct a store or stores on the Hortter street front, even though the structures are limited in height to 15 feet above the street level (as required by the restriction in the deed) the fact that he may do so will result in depreciation of the value of their property. If it does, the result is *damnum absque injuria*. The original zoning ordinance which took in only the 134 feet front containing the drug store gave plaintiffs no vested right which would prevent the city from subsequently amending the ordinance by adding the remaining 100 feet on the same side of Hortter street to the Class A Commercial zone. The power to amend the zoning ordinance was expressly conferred by the legislature. The ordinance of 1933 fixing the boundaries of the zones did not result in a contract with plaintiffs preventing the city from subsequently changing the boundaries if the city found it desirable to change them. *Ayars v. Wyoming Valley Hospital*, 274 Pa. 309, 118 A. 426. Generally, equity will not take jurisdiction to enjoin the enforcement of an ordinance merely because it might be condemned as void; other circumstances bringing the case under some acknowledged head of equity jurisdiction must be shown. Ordinance by Borough of State College, 104 Pa. Super. 211, 158 A. 298; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 29 S.Ct. 426, 53 L.Ed. 796. The plaintiffs have not brought themselves within the rule. If defendant constructs a nuisance on his property, the zoning ordinance will not save him; plaintiffs will then have their remedy. The mere fact, if it be a fact, that the extension of the boundary to bring within the zone the 100 feet along Hortter street may depreciate the market value of plaintiff's property will not render the ordinance invalid. *Korr's Appeal*, 294 Pa. 246, 144 A. 81."

COVENANTS - RESTRICTIONS - BENEFICIARIES

(*Young v. Cramer et al.*, District Court of Appeals, Fourth District, California, 100 P. 2d 523).

Restrictions and covenants in deeds can only be enforced by owner of a part of the land for the benefit of which the restrictions and conditions were created.

The appellant in this action sought a judgment to declare that title to certain real property had reverted to him because of the breaching of restrictions and conditions set forth in a deed by which the property had been conveyed to a predecessor of respondents.

"The appellant was originally a beneficiary under a subdivision trust in which a bank was the trustee. All of the lots in the subdivision were sold and all were conveyed by the trustee through deeds containing the restrictions, conditions and provisions here in question. The respondents' predecessor purchased two of the lots and later conveyed them to the respondents. After all of the lots were sold the trustee bank conveyed its right of re-entry to the beneficiaries of the subdivision trust in proportion to their respective interests in the trust. The appellant, claiming a violation of certain building restrictions, sought a judgment declaring that the title to these two lots had reverted to him, although he holds only an undivided 550/1000ths interest in said right of re-entry and the holders of the other fractional interests in said right of re-entry have refused to join him in the prosecution of the action."

The complainant alleged that all lots in the tract had been conveyed by deeds containing certain building restrictions which, among other things, stated that a breach of the conditions and restrictions shall revert to the grantor, its successors or assigns, each of whom shall have the right of re-entry upon breach thereof, and as to the owner of any other lot in the subdivision the restrictions shall operate as covenants running with the land, and a breach may be enjoined by such grantor, its successors or assigns, but by no other person. The restrictions were for the benefit of the subdivision as a whole.

The appellant was unable to allege that he was the owner of any land within this subdivision and the question presented on this appeal was whether a cause of action was stated in the absence of such allegation. The appellant contended that the deed to the lots in question, which passed from his predecessor to the predecessor of the respondents, contained the reservation of a right of reversion; that this constituted a part of the estate which was not conveyed; and that he has acquired this interest, which is sufficient to enable him to maintain this action although he owns no property in the subdivision. In regard to this contention of appellant the court said:



".....In passing upon a similar contention the Supreme Court, in Parry v. Berkeley, etc., Foundation, 10 Cal. 2d 422, 74 P.2d 738, 740, 114 A.L.R. 562, said: 'A more accurate analysis of the interests involved discloses that when the grantor conveys the fee simple on condition subsequent, he has no actual estate remaining with him. The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute. The interest of the grantor in such case is not, strictly speaking, a residue of the estate left in him; it is merely a right of power to terminate the estate of the grantee and retake the same, if there is a breach of condition.'"

The court in upholding the decision of the lower court and denying relief to appellant said:

"In Firth v. Marovich, 160 Cal. 257, 116 P. 729, 731, Ann.Cas. 1912D, 1190, it is said: 'It is not open to question that building restrictions of the kind contained in the deed from plaintiff to Scherer are valid and enforceable at the suit of the grantor, so long as he continues to own any part of the tract for the benefit of which the restrictions were exacted.' In Los Angeles University v. Swarth, 9 Cir., 107 F. 798, 806, 54 L.R.A. 262, the court said: 'But the complainants do not show in their bill, and it is not shown by affidavit or otherwise, that they are now the owners of or have any interest in any lands in the vicinity of the university buildings or the campus connected therewith, but, on the contrary, it is averred upon information and belief, in one of the affidavits, that the complainants have no such interest. The inference is, therefore, that the complainants are not in any way interested in the benefit arising from the restriction or limitation placed upon the granted estate by the terms of the covenant contained in the deed, and that the complainants will not be damaged by the failure of the defendants to comply with the terms of the covenant. They are therefore not in a position to maintain this action.'"

"While the decisions in other states upon the question now before us are in conflict, it is recognized by the law writers that the majority view is to the effect that such restrictions and conditions as those now before us can be enforced only by the owner of a part of the land for the benefit of which the restrictions and conditions were created. Among the cases supporting this view are Sanborn v. Rice, 129 Mass. 387; Stevens v. Galveston, H. & S. A. Ry. Co., Tex. Com. App., 212 S.W. 639; Merrifield v. Cobleigh, 4 Cush. 178, 58 Mass. 178; Crocker v. Ingersoll Engineering & Construction Co., 6 Cir., 249 F. 31; Barrie v. Smith, 47 Mich. 130, 10 N.W. 168; Maddox v. Adair, Tex. Civ. App., 66 S.W. 811; Davis V. Skipper, 125 Tex. 364, 83 S.W. 2d 318.".....



"We think it clearly appears that the right to which the appellant lays claim is not strictly an estate in reversion and that it is not a personal covenant of which he may take advantage. It is an equitable easement or servitude created for the benefit of other lots in the tract and their owners. In so far as here appears there was nothing for the trustee bank to convey to the appellant and he acquired nothing by that conveyance which would enable him to maintain this action, in the absence of the ownership of a portion of the land for the benefit of which the restrictions, conditions and provisions were made. The provisions of the deed should be read as a whole and, so taken, they disclose that the right given to the grantor to have the title reverted upon the breach of the conditions was given to the grantor as an owner of land in the tract and not personally, and it must be held that the exercise of such a right is dependent upon the continuance of ownership of some part of the tract, the benefit of which was the sole purpose of entire agreement."

#### COVENANTS - STATUTES

(Pocono Manor Ass'n et al v. Allen et al, - Pa. -, 12 A. 2d 32).  
The general expression "dwelling purposes" following the particular expression "cottage residences" in deed requiring that lots be used only for erection and maintenance thereon of building for "cottage residences" and "dwelling purposes" was presumed to be restricted by the particular designation and to include only things of the same kind as that enumerated. The language of a statute must be read in a sense which harmonizes with the subject matter and its general purpose and object.

The Plaintiffs filed a bill to enjoin defendants from converting a private dwelling on their land into a house of four or five separate apartments. The Pocono Manor Association acquired in the Pocono Mountains an extensive area of land, part of which was divided into lots and sold. Defendants acquired three of these lots and own them in fee simple. The association inserted into all of their conveyances restrictions, one among them being the following "And provided further, that not more than one cottage or dwelling house shall be erected upon any lot hereby conveyed."

Plaintiffs object to defendants carrying out their plans to convert this dwelling into apartments, as violative of the restrictions pleaded and as detrimental to plaintiff's property. Defendants deny that the challenged acts are detrimental or in contravention of the restrictions. The court granted plaintiffs the relief sought and on appeal the decision was affirmed. The Supreme Court of Pennsylvania said:

"When the defendants accepted the deed of Sarah H. Allen conveying the premises in controversy, subject to the stated restrictions, these became 'the law' as to the future use of the premises. Therefore, in interpreting this restriction the same logical processes are applied as in interpreting statutes. It is a rule that 'the language of a statute must be read in a sense which harmonizes with the subject matter and.....(its) general purpose and object..... The general design and purpose of the law is to be kept in view and the statute given a fair and reasonable construction with a view to affecting its purpose and object, even if it be necessary, in so doing, to restrict somewhat the force of subsidiary provisions that otherwise would conflict with the paramount intent' 25 R. C. L., sec. 253, page 1013.....

"We believe that the restriction invoked constitutes a legal barrier to the threatened intrusion. The only buildings permitted on the restricted land are those 'for cottage residences and dwelling purposes.' The dominant idea in the phrasing is that of 'cottage residences', and it is further stipulated that only 'one cottage or dwelling house' shall be upon a single lot. Oneness of family in habitation is encouraged; plurality of families in habitations is interdicted.

"The general expression 'dwelling purposes' follows the particular expression 'cottage residences' and therefore the former expression is presumed to be restricted by the particular designation, and to include only things of the same kind as that enumerated. This court said in *Burns v. Coyne*, 294 Pa. 512, 516, 144 A. 667, 668: 'Where specific expressions are followed by those which are general, the latter will be confined to things of the same class as the former.' The Superior Court in *Real Estate-Land Title & Trust Co. v. Bankers' Trust Co.*, 104 Pa. Super. 493, 495, 158 A. 634, 635, said: 'General terms are referable to the same kind of articles as those enumerated', i. e., 'those articles which are ejusdem generis'.

"There is no doubt about the meaning of the word 'cottage'. An apartment house or a multiple dwelling house is not a cottage. When defendants rely upon the words 'building for dwelling purposes' as a passport for admitting their apartment house to this restricted area, they overlook the 'cottage residences' limitation and ignore the rule (already referred to) as to an antecedent particularization limiting a succeeding generality. If any structure that comes within the words 'buildings for dwelling purposes' is admissible in this area, then the 'restriction' is no restriction at all and the authors of it did a vain thing for under that view no kind of structure in which human beings dwell could be excluded.



Even a penitentiary or almshouse would qualify for admission to such a 'restricted' area. Before a court will interpret a provision in a statute or in a contract in such a way as to lead to an absurdity or make the statute or contract ineffective to accomplish its purpose, it will endeavor to find an interpretation which will effectuate the reasonable result intended. The interpretation of the restriction in question was so interpreted by the court below as to promote and not to defeat its obvious purpose. With that interpretation we agree.".....

"The word 'private' which this court considered so significant in the case just cited is of no greater force in connoting the idea of one-ness of family to a lot than is the idea of 'cottage residence'. An apartment house for four or five families, as planned by the defendants, is as irreconcilable with the restriction of building a 'cottage residence' as this court adjudged it to be with the restriction of building 'a private dwelling house'. The peace and privacy of life in a cottage has inspired many lyrical lines of poetry, but no poet's muse has yet been stirred to rhythmic verse by life in an apartment house."

COVENANTS - TOURIST HOMES - NUISANCES - LACHES

(Deitrick v. Leadbetter et al., Supreme Court of Appeals of Virginia, 8 S. E. 2d. 276).

Tourist homes conducted in residential districts are not nuisances. However, it is a business and may not be carried on where property is restricted for residential purposes.

Defendant bought a house in a subdivision, which, among other restrictions provided that no part of the premises shall be used for any purpose that will create a nuisance or make such use of the premises injurious or offensive to a good residential neighborhood, and "that said land shall not be used except for residential purposes."

Defendant had only constructive notice of these restrictions before purchasing the house, and further, testified that it was her intention to buy it as a tourist home and not as a private residence. Plaintiff has enjoined defendant from using the premises as a tourist home and defendant appealed, which appeal was affirmed.

The court found that other homes in the neighborhood had been and were now being used as tourist homes. It found that use of homes for this purpose was not a nuisance. However, even though other homes were being used for tourist trade, certain restrictions had been imposed upon defen-

dant's premises which must be abided by. "Whenever land is developed under a general scheme, reasonable restrictive covenants which appear in deeds to all lots sold are enforceable alike by the vendor and by the vendees and by their successor in title /citing cases/. While such covenants are to be strictly construed, they cover things forbidden by necessary implication, just as they cover things named with unmistakable exactness....."

In regard to boarding houses being private residences, the court said that "Boarding houses are not private residences, and, on principle, it makes no difference if the boarder stays one day or two /citing cases/ ....."

Although defendant had carried on this tourist business for some time and it was only when she requested a permit to build additional rooms to her house that this injunction was obtained, the court held that nevertheless, the plaintiffs had not slept upon their rights. In this regard it said:

"Mere 'acquiescence does not constitute abandonment so long as the restrictive covenant remains of any value.' Rogers v. Zwolak, 12 Del. Ch. 200, 110 A. 674, 677. 'The plaintiff's right to relief from a violation of the restriction which directly affects her lot, was not forfeited by a mere failure to object to similar violations by some others in the neighborhood.' Goulding v. Phinney, 234 Mass. 411, 125 N.E. 703, 704. To the same effect is Bischoff v. Morgan, 236 Mich. 251, 210 N.W. 226.

'The fact that the owner of property does not complain of the violation of a restriction by another or other owners against whom he is, or at least was, entitled to have the restriction enforced, which violation does not materially affect him in the enjoyment of his property, does not preclude him from enforcing the restriction against an owner whose violations of it does materially affect him.' Berry on the Restrictions on the Use of Real Property, sec. 374."

The court concluded by stating:

"Those who conduct taverns, hotels and boarding houses may live in them, but can it be said that they are not 'used except for residential purposes?'"



GARNISHMENT

(United States v. Winkle Terra Cotta, Inc., et al., Circuit Court of Appeals, Eighth Circuit, 110 F. 2d 919)

The FHA is subject to garnishment proceedings, and a judgment against it is not a judgment against the United States, and funds of the United States cannot be subjected to satisfy the judgment. The United States, not being a party to the state action herein, is not bound by the judgment entered.

This appeal is from a judgment entered on July 15, 1939, which in effect dismissed a bill of complaint by which the United States sought to enjoin proceedings in an action in garnishment in a state court for failure to state a cause of action upon which relief could be granted.

The Winkle Terra Cotta, Inc., a corporation, obtained a judgment against an employee of the Federal Housing Administration, and it was summoned as garnishee in aid of execution. Upon regular procedure judgment was entered against it as garnishee. Thereafter, the United States, through its District Attorney, applied for leave to appeal from the judgment in garnishment, but its application was denied on the ground that it was not a party to but was a stranger to the record.

"It is alleged that the Federal Housing Administrator had, pursuant to authority, acquired title to real property and in the due execution of his office conveys title to purchasers thereof; that such titles are held in behalf of the United States; that the defendants threaten to levy execution on the real property so held and on certain personal property held by the Federal Housing Administration for and in behalf of the United States to satisfy the judgment against the Federal Housing Administration, and that Winkle Terra Cotta, Inc., claims to have some right, title or interest to said property by reason of its judgment, claiming that the judgment constitutes a lien upon the real property so held and that by reason of this fact the judgment is a cloud on the title to the property, and the Federal Housing Administrator is unable to perform his duties, in that he is unable to sell the property because of the lien asserted by Winkle Terra Cotta, Inc. It was alleged that the state court was wholly without jurisdiction to enter judgment in the garnishment proceedings, and that the judgment was therefore void."

The defendants filed separate answers, and on hearing preliminary to trial on the merits the court sustained the legal defenses and held that plaintiff was not entitled to relief. The plaintiff declined further to

to amend its complaint and the court entered judgment that plaintiff take nothing by its bill of complaint, and plaintiff appealed. The decision of the court is as follows:

"As originally briefed and argued, the appellant contended in support of the sufficiency of its complaint: (1) that the state court proceeding was in effect an attempted suit against the United States and its property; (2) that any judgment obtained in a suit against the United States or its property without its consent is void; (3) that the United States had not consented to be sued in the state court; therefore, the judgment was void; (4) that the threatened enforcement of such void judgment constitutes a valid cause of action within the jurisdiction of the district court, and such enforcement should be enjoined. Counsel for appellant in their supplemental brief now state that on the basis of the opinion in Federal Housing Administration, Region No. 4, State Director Raymond Foley, Petitioner v. Ruth Burr, 60 S. Ct. 488, 84 L. Ed.--, decided by the Supreme Court on February 13, 1940, being opinion No. 354, they now abandon the contentions (1) that the judgment of the Circuit Court of St. Louis County was void and (2) that no execution whatsoever was allowable to enforce the judgment of the Circuit Court of St. Louis County. They contend, however, that (1) only certain funds are subject to execution and all other funds and property are immune from execution under the Constitution of the United States; (2) that the particular property and funds upon which appellees have executed and threatened to execute are not subject to execution, and to allow such execution would be to allow proceedings against the United States where it has not waived its immunity.

"The Supreme Court in Federal Housing Administration, etc., v. Burr, supra affirmed the decision of the Supreme Court of Michigan in Burr v. Heffner, 289 Mich. 91, 286 N.W. 169, holding that the Federal Housing Administration was subject to garnishment for money due to an employee. In view of the decision in the Burr case, it must be conceded that there was not only a valid judgment in favor of Winkle Terra Cotta, Inc., against Barnett, but there was also a valid judgment in garnishment entered against Federal Housing Administration. We are not here concerned with any proceedings taken or orders entered subsequent to the entry of the judgment appealed from. An appeal from the judgment did not bring before us for review any proceeding had subsequent to its entry. The judgment in garnishment is valid and has not been appealed from. Its correctness can not be reviewed in this suit, and the rights of the parties thereunder are both limited and determined thereby.



"The Federal Housing Administration can not claim immunity from process so far as it is concerned. The United States was not a party to the state action and it is not bound by the judgment entered. The judgment entered against the garnishee was not a judgment against the government and does not entitle plaintiff therein to subject funds or property of the United States to the satisfaction of its judgment.

"It is now urged by appellant that under the rule announced in *Federal Housing Administration v. Burr*, supra, the funds and property sought to be subjected to the payment of the Winkle Terra Cotta, Inc., judgment are immune because not such as have been paid over to the Federal Housing Administration in accordance with Section 1 of the Housing Administration Act, 12 U.S.C.A. § 1702, and which are in its possession severed from treasury funds. The pleadings present no such issue. That was not the ground upon which plaintiff sought injunction in the lower court. It was there claimed, and has been consistently urged here, until the decision of the Supreme Court in *Federal Housing Administration v. Burr*, supra, that the Federal Housing Administration was an integral part of the United States Government and merely a federal agency and instrumentality, not an entity separate and apart from the United States but a branch or department thereof. It was upon this allegation that it was urged not only in the court below, but in the state court, that the state court acquired no jurisdiction to enter the judgment in garnishment, and it was upon this ground that it was alleged that 'said garnishment proceedings were in effect against the United States, of which said proceedings said Circuit Court of the County of St. Louis, State of Missouri, had no jurisdiction.' The entire contention of the plaintiff was bottomed on the want of jurisdiction of the state court in the garnishment proceedings, for the reason that the Federal Housing Administration was merely a branch of the Government. The issue now urged was clearly not presented to nor determined by the lower court. This is a court of appellate jurisdiction, and we are without authority, on the record before us, to determine this question, even though the parties consent thereto. It is true that, in certain exceptional circumstances, pleadings may be amended even in the appellate court, to conform to the proof for the purpose of sustaining the judgment, but this will not be allowed where such amendment would bring about the reversal of a judgment otherwise correct.

"If and when the question as to whether the funds or property sought to be subjected to the payment of appellees' judgment belongs to the United States is presented, whether in the lower court or the state court, we must assume that the funds or property of the United States will not be held responsible. The judgment appealed from is therefore affirmed."

MORTGAGES - ACCOUNTING - MORATORIUM

(Palazzini v. Vanasco et al. - Mich. - , 290 N.W. 811).

An accounting may be had by mortgagors at the end of a moratorium period if request is made of the trial court. Question of accounting may not be raised on appeal.

Plaintiff foreclosed a mortgage on defendant's property and purchased it at the sale in July 1933. In December defendants petitioned for moratorium relief which was granted and by subsequent orders continued until November 1938 when the moratorium was terminated. Defendants appealed claiming the property constituted their homestead and were entitled to a moratorium until July 1939, and also "Because the entering of an order denying said moratorium relief, without first requiring an accounting of the rental value therefore paid to and collected by plaintiff and appellee and of the disbursements made therefrom pursuant to court orders directing the allocation of said rentals, and fixing and determining the amount then due and for which redemption could be made, constituted an abuse of discretion upon the part of said Circuit Judge."

The defendants abandoned the question of homestead rights. Furthermore the record did not show that an accounting was at any time requested or even called to the attention of the circuit judge.

The court held that an accounting, if desired, is at the end of the moratorium, citing the case of Hissey v. Petz, 289 Mich. 668, 287 N.W. 338.

The court further said: "If defendants desired to redeem, and to that end have an accounting, they should have asked for it and, under the record, not having asked for it cannot raise the point for the first time on appeal. If an accounting was desired and, in fact, notwithstanding the record, requested and not passed upon by the court the proper step would have been a timely application to the court for reconsideration."

MORTGAGES - REFORMATION

(HOLC vs. Theron Y. Sebring, Circuit Court, Kalamazoo County, Michigan, in Chancery. May 1940).

Reformation of mortgage will be ordered because of mistake by one party accompanied by fraud on part of other party. Reformation of mortgage relates back to date of mortgage, and if there is a foreclosure, it should be of the mortgage as reformed.



In a suit by HOLC to reform one of its mortgages the opinion of the Circuit Court of Kalamazoo County, Michigan, was as follows:

"Plaintiff, in effect, seeks reformation of a mortgage in respect to the description upon the theory of mutual mistake. Defendant applied to plaintiff in writing for a loan and furnished a description of his entire homestead property in two parcels. Plaintiff's appraiser, John Burke, inspected the premises in the presence of defendant, who indicated to him the lines of the entire property, including the two rod parcel in the rear in controversy with the garage. Plaintiff inadvertently failed to include that parcel in the mortgage.

"Defendant being in default, plaintiff foreclosed by advertisement. Plaintiff acquired the property on its bid for the entire amount due. There were no other bidders. The notice of sale and the Sheriff's deed contain the description in the mortgage. Plaintiff has possession of the house and land described in the mortgage and made demand on defendant to convey the two rod parcel at the rear. Defendant should convey such parcel, but refuses.

"Defendant, called as an adverse witness by plaintiff, testified he knew the description in the mortgage did not include the separate two rod parcel and did not intend to have it included.

"Since the hearing, counsel for plaintiff has by letter directed my attention to *Retan v. Clark*, 220 Michigan, 493 and *Lee State Bank v. McElheny*, 227 Michigan 322. Under these decisions plaintiff is entitled to relief. As stated in the latter decision at page 327: 'There was either a mutual mistake or a mistake by the bank accompanied by fraud on the part of McElheny and either one gives right to have reformation.' As also stated on page 327, however, 'Reformation relates back to the date of the mortgage.' Therefore, there must be foreclosure herein of the reformed mortgage including the two road parcel with resale of the entire premises.

"Plaintiff may retain possession of the premises conveyed by the Sheriff's deed subject to the reasonable value of the use thereof, provided Plaintiff shall realize the full amount of principal, interest and costs due upon the reformed mortgage upon sale. If plaintiff shall recover less than the full amount due, then it shall not be chargeable with rent for the use of the premises, unless the reasonable value of the use thereof shall exceed the difference between the full amount due and the amount realized by plaintiff, and in that event plaintiff shall be chargeable with the excess only."

MORTGAGES - STATUTES

(HOLC vs. Caroline E. Stokes, et al., District Court of the United States for the Southern District of Florida, Tampa Division. May 1940.

In Florida, HOLC was unable to foreclose a loan made under Section 4(g) of its Act because mortgagee, a married woman, was insane at time loan was closed, but successfully maintained suit under a section of Constitution of Florida providing that a married woman's separate property may be charged with the purchase money therefor.

HOLC attempted to foreclose a loan made to Caroline E. Stokes and her husband, Clarence J. Stokes, under Section 4(g) of the Home Owners' Loan Act but was defeated in the Supreme Court of Florida upon the ground that when it made the loan Caroline E. Stokes was insane and Clarence J. Stokes, who had executed the mortgage in her behalf, had not been legally authorized to do so - the authority having been given by a Circuit Court of Florida when it should have been given by the proper County Court of that State. There was no valid lien to which HOLC could be subrogated, but the property was the separate property of Caroline E. Stokes and HOLC filed in the District Court of the United States for the Southern District of Florida, Tampa Division, a suit to charge the separate property of Caroline E. Stokes with the amount of the HOLC loan, interest and tax advances which had in effect purchased the property for her. The suit was based upon a section of the Constitution of Florida which provides for the charging of a married woman's separate property for the purchase price thereof.

At the trial, the District Court of the United States entered a decree charging the property for the amount of the loan and interest thereon, the amount of taxes advanced by HOLC and interest thereon and fire insurance premiums paid by HOLC and interest thereon, and ordered a sale of the property to satisfy the charges. The Court also held that these charges in favor of HOLC took priority over a mortgage executed by Caroline E. Stokes and Clarence J. Stokes after Caroline E. Stokes had recovered her sanity and prior to the institution of the suit by HOLC in the District Court of the United States.

MUNICIPAL CORPORATIONS - GOVERNMENT - HOUSING BOARDS

(Stark v. Fell et al. - N. J. -, 12 A 2d 706)

Where City of Trenton adopted a new form of government under the Walsh Act (N.J.S.A. 40:70-1 et seq.), providing a change in form of govern-



ment of Trenton from the "municipal manager" to the "commission form" and that all officers "whether elective or appointive, shall immediately cease and determine", with certain expressed exceptions which clearly did not include members of the Housing Authority, board of commissioners properly appointed a new Board of Housing Authority of the City of Trenton.

The Supreme Court of New Jersey held that the fact that the Housing Authority of the City of Trenton was a separate corporate entity and could issue bonds and otherwise act independently of City did not mean that it was not engaged in a "purely local municipal function" as an agency and instrumentality of the municipality creating it, and hence it was subject to the Walsh Act when the City adopted a new form of government under the Walsh Act, and the terms of office of members of the Housing Authority expired with the event of the new City government.

STATUTES - APPEAL AND ERROR - DEFICIENCY JUDGMENTS

(HOLC vs. B. B. Wiggins, Jr., et al., - Miss. - May, 1940)

Under Section 3378, Code of Mississippi of 1930, Supreme Court of Mississippi can permit waiver of claim for attorney's fee and enter final judgment for principal and interest of indebtedness sued upon where amount of principal and interest were properly proven in trial court.

In a suit for deficiency judgment by HOLC, the trial court permitted proof by the defendants that the mortgaged property which HOLC had bid in at the foreclosure sale at less than the amount of the mortgage indebtedness was worth as much or more than the amount of the mortgage indebtedness, and then denied HOLC a peremptory instruction for judgment in the amount of the deficiency and interest and for a reasonable attorney's fee to be fixed by the jury. On appeal by HOLC to the Supreme Court of Mississippi, that court held that HOLC was entitled to the peremptory instruction, but it ordered the case to be "reversed and remanded". Within the time allowed by the rules, HOLC filed in the Supreme Court of Mississippi a suggestion of error offering to remit or waive its right to any attorney's fee and insisting that the court should have entered a judgment in its favor for the amount of the deficiency and interest (the amount of which had been proven in the trial court) and should have remanded the case only on the issue of the amount of a reasonable attorney's fee to be fixed by a jury. The defendants resisted this suggestion of error and insisted that the Supreme Court, under Section 3378, Code of Mississippi of 1930, was without power to enter final judgment for the deficiency and interest. The defendants insisted that the case be remanded generally so that they might raise additional defenses the nature of which they did not disclose.

The Supreme Court stated that it had already held that the trial court should have entered a judgment in favor of HOLC for the amount of the proven deficiency and interest, submitting to the jury only the issue of a reasonable attorney's fee to be assessed by it. It then said:

"In this state of the record we are of the opinion that this Court is fully invested with authority to enter such judgment as the court below should have entered - that is, for the amount of the balance due on the note, \$1,504.57, with interest, as above stated. Had our attention been called to it, it would have so appeared in the opinion handed down by this Court. Since the appellant [HOLC] waives the right to have the jury assess an attorney's fee, there is nothing now pending upon which to order a remand of the case. The remittitur of claim to attorney's fees by the appellant will be permitted, and to that extent the suggestion of error will be sustained and judgment final entered here for the appellant in the amount of the debt, with interest thereon, as above set forth. Instead of remitting a fixed sum, as is the usual practice in this court, the appellant here remits all attorney's fees.

"The case of *Couret, et al., v. Commer, et al.*, 118 Miss. 598, 79 So. 801, is not in point. If a remittitur was intended, as appellees argue, it came too late, after the time allowed under the rules of this Court had expired, and judgment had become final by the adjournment of the Court in the interim. That is all that was decided by a majority of the Court.

"Likewise, the case of *Crudup v. Roseboom*, 125 Miss. 205, 88 So. 497, is not in point for the reason that here a remittitur of attorney's fees is offered in due time; that is, within fifteen days after the rendition of the final judgment - therein lies the difference.

"Section 3378, Code of 1930, authorizes us to enter such judgment as the court below should have entered, and, we think, is ample authority for the procedure here."

#### TAXATION - LEGISLATION

(*People ex rel. Prosperity Co., Inc., v. Marvin, et al.*, Supreme Court, Appellate Division, Fourth Department, 19 N.Y.S. 2d 199)  
Granted that determination by municipal taxing authorities, as to what was the property that was benefitted by local improvement was in nature of a legislative act, nevertheless it cannot escape judicial review where it is utterly arbitrary and capricious.



The taxing authorities of Syracuse levied a tax upon petitioner's property for a local improvement. The petitioner by certiorari proceeding, sought to establish the illegality of the assessment upon several grounds, among them being the claim that the tax was levied for more than the cost of the improvement, and another being that the tax was inequitable in that it was all assessed against property not at all benefitted by the improvement and that no part of it was assessed against the only property that was benefitted. The lower court upheld the validity of the assessment without giving petitioner an opportunity to prove facts to sustain its other claim that the tax was inequitable. On appeal the higher court said:

"Granting that the determination by the taxing authorities, as to what was the property that was benefitted by the local improvement, was in the nature of a legislative act, nevertheless it cannot escape judicial review where it is utterly arbitrary and capricious. Section 34 of the Tax and Assessment Act of the City of Syracuse (Laws of 1906, Chap. 75) provides for such review, and that act also provides for levying assessments for local improvements against the property benefitted. Matter of City of New York, 218 N. Y. 234, 112 N. E. 918; People ex rel Keim v. Desmond, 186 N. Y. 232, 78 N. E. 857; Matter of City of New York, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A., N. S. 335; Matter of Long Island R. R. Co. v. Hylan, 240 N. Y. 199, 205, 148 N. E. 189; Village of Norwood v. Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443.)....."

#### TAXATION - TAX LIENS - PRIORITY

(HOLC v. Axel Hansen, et al., District Court of Appeals, Third Appellate District of California. May 1940)

In California, tax liens do not ex proprio vigore have priority or preference over previously recorded mortgages or deeds of trust. For tax liens to have such priority or preference the tax statute must disclose a specific legislative intent.

In an HOLC foreclosure suit, the State of California claimed priority over the HOLC mortgage for a judgment in its favor against the mortgagor for \$16.28, principal, interest and penalty of retail sales taxes due the State by the mortgagor. The HOLC mortgage was executed August 2, 1934 and was recorded on October 5, 1934. A license or permit to engage in the sale of tangible personal property at retail was issued to the mortgagor by the board of equalization of the State of California for the period from July 1, 1934 to September 15, 1935, and the \$16.28 of taxes, interest and penalty involved accrued during that period under the California Retail Sales Tax

Act of 1933. The amendment of 1935 providing that the State does not have a preference over recorded liens which attached prior to the dates the taxes became a lien had no application to the case as it related only to taxes accruing from and after September 15, 1935.

The trial court held that under the Act of 1933 (the effective Act) the State did not have a priority or preference over the HOLC mortgage, and the State appealed to the District Court of Appeals of California. That court held that the 1935 amendment had no application and that the case was controlled entirely by the 1933 Act which was silent on the right of priority of lien. It then reviewed *Daugherty v. Henarie*, 47 Cal. 9, *California Loan Co. v. Weiss*, 118 Cal. 489, *O'Dea v. Mitchell*, 114 Cal. 375, *Guinn v. McReynolds*, 117 Cal. 230, 170 Pac. 421, *Bolton v. Terra Bella Irr. District*, 106 Cal. App. 313, 289 Pac. 679, and *San Mateo County Bank v. Dupret*, 124 Cal. App. 395, and held that in California tax liens are not *ex proprio vigore* superior to pre-existing mortgages or deeds of trust and that a specific legislative intent is necessary to give a tax lien preference over a prior recorded mortgage or deed of trust. The court then analyzed the 1933 Act to determine whether it disclosed a legislative intent to give the retail sales tax lien priority or preference over prior recorded mortgages or deeds of trust, and held that it did not. It therefore held that the State was not entitled to priority or preference over the HOLC mortgage.

#### UNITED STATES - STATUTES OF LIMITATIONS

(*United States v. Summerlin*, - U.S. -, No. 715, May 27, 1940).

The United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights.

This rule applies whether the United States brings its suit in a federal court or in a state court.

The FEA, acting on behalf of the United States, became the assignee of a claim against the estate of one J. F. Andrews, deceased. The respondent was appointed ancillary administratrix. On August 13, 1937 she gave notice by publication to the creditors of the estate to file proof of their claims within eight months as required by the Florida state statute.

The United States, on July 1, 1938, filed its claim in the office of the County Judge, with a petition asking that the claim be allowed with the priority accorded by the federal statutes (31 U. S. C. 191, 192) and also asserting that the state statute as to the time for filing claims did not apply to claims of the United States. The County Judge denied the petition, holding that the state statute was applicable and further adjudging that the claim of the United States be "disallowed as a claim against the estate" of the decedent.



An appeal was taken to the Circuit Court of Polk County where the order of the County Judge was affirmed. The Supreme Court of Florida upheld the judgment of the Circuit Court. Certiorari was granted by the United States Supreme Court which held that "so far as the judgment goes beyond the question of the jurisdiction of the probate court and purports to adjudge that the claim of the United States is void as a claim against the estate of the decedent because of failure to comply with the statute, the judgment is reversed". The court in its opinion said:

"The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it. Act of June 27, 1934, 48 Stat. 1246. Compare *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 32, 33.

"It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. *United States v. Thompson*, 98 U. S. 486; *United States v. Nashville, Chattanooga & St. Louis Rwy. Co.*, 118 U. S. 120, 125, 126; *Stanley v. Schwalby*, 147 U. S. 508, 514, 515; *Guaranty Trust Company v. United States*, 304 U. S. 126, 132; *Board of Commissioners v. United States*, 308 U. S. 343, 351. The same rule applies whether the United States brings its suit in its own courts or in a state court. *Davis, Director General of Railroads v. Corona Coal Co.*, 265 U. S. 219, 222, 223.

We are of the opinion that the fact that the claim was acquired by the United States through operations under the National Housing Act does not take the case out of this rule. The state court treated the case as in the same category as one of "statutes providing for conveyancing and marketing negotiable instruments, and conducting other business relations". But this is not a case relating to the application of the law merchant as to the transfer of negotiable paper and the diligence necessary to charge an endorser or as to the incurring by the United States of certain responsibilities by becoming a party to such paper. *United States v. Barker*, 12 Wheat. 559; *Cooke v. United States*, 91 U. S. 389, 396. Even as a holder of such paper, as e.g. negotiable bonds, the United States suing the maker is not bound by a state statute of limitations. *United States v. Nashville, Chattanooga & St. Louis Rwy. Co.*, supra. When the United States becomes entitled to a claim, acting in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement. *Chesapeake & Delaware Canal Company v. United States*, 250 U. S. 123, 126, 127.

"The state court, however, has said that the statute in question is not a statute of limitations, but rather a statute of 'non-claim' for the orderly and expeditious settlement of decedents' estates. Presumably the court refers to the provision of the statute that if a claim is not filed within the specified period 'it shall be void even though the personal representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise'.

"If this were a statute merely determining the limits of the jurisdiction of a probate court and thus providing that the County Judge should have no jurisdiction to receive or pass upon claims not filed within the eight months, while leaving an opportunity to the United States otherwise to enforce its claim, the authority of the State to impose such a limitation upon its probate court might be conceded. But if the statute, as sustained by the state court, undertakes to invalidate the claim of the United States, so that it can not be enforced at all, because not filed within eight months, we think the statute in that sense transgressed the limits of state power. Davis, Director General of Railroads v. Corona Coal Company, supra."

.....

"We hold that the state statute in this instance requiring claims to be filed within eight months cannot deprive the United States of its right to enforce its claim; that the United States still has its right of action against the administrator, even though the probate court is to be regarded as having no jurisdiction to receive a claim after the expiration of the specified period.

"So far as the judgment goes beyond the question of the jurisdiction of the probate court and purports to adjudge that the claim of the United States is void as a claim against the estate of the decedent because of the failure to comply with the statute, the judgment is reversed.

"The cause is remanded for further proceedings not inconsistent with this opinion."

WATER SERVICES - ESTOPPEL

(HOLC vs. City of Tacoma, - Wash. -, May 20, 1940)

City of Tacoma, Washington can discontinue water services to properties to enforce payment of delinquent charges for services furnished former owners prior to June 7, 1933. Statute of limitations is not applicable to enforcement of such charges. There is no estoppel against City because of previous discontinuance of services to enforce payment and later resumption of services without enforcing payment.



In a suit brought by HOLC against the City of Tacoma, Washington, to recover delinquent water and light charges paid by it under protest on some of its acquired properties, the trial court allowed a recovery as to some charges for services furnished after June 7, 1933 and denied a recovery as to the charges for service furnished prior to June 7, 1933. On appeal to the Supreme Court of Washington the controversy centered on the correctness of the holding as to the charges for services rendered prior to June 7, 1933. These services had of course been furnished to the properties several years prior to the acquisition of ownership of the properties by HOLC, and in fact prior to the taking by HOLC of the mortgages which later resulted in the acquisition of ownership of the properties. It appeared also that in the case of each property involved the City, prior to acquisition of title and possession by HOLC, had exercised its privilege to discontinue its services at least twice and had later resumed the furnishing of services without a demand or insistence upon the part of the City that the balance owing as of June 7, 1933, first be paid in full. The statutes dealt with by the court were Sections 1 and 2, Laws of 1909 (Rem.Rev.Stat., Sections 9471 and 9472) and the amending act of 1933. Sections 9471 and 9472 were as follows:

Sec. 9471. "Liens for unpaid charges. Cities owning their own waterworks, electric light or power plants, are hereby granted a lien for delinquent and unpaid charges for water or electric light or power, against the premises to which the same has been furnished."

Sec. 9472. "Enforcement of lien. Said lien may be enforced by cities only by cutting off water or electric light or power against the premises to which the same has been furnished, after the charges become delinquent and unpaid, until such charges are paid. In the event of a disputed account, and tender by the owner of the premises of the amount claimed by him to be due prior to the city discontinuing such a service, the right to so refuse service to any premises shall not accrue until suit has been entered by the city, and judgment entered in such case."

The amending act of 1933, which became effective June 7, 1933, was as follows:

"Liens for unpaid charges. Cities owning their own waterworks, electric light or power plants, are hereby granted a lien for delinquent and unpaid charges for water or electric light or power, against the premises to which the same has been furnished:

Provided, That the owner, or the owner of a delinquent mortgage on, of said premises may give written notice to the superintendent or other head of such works or plants to cut-off service to said premises, and from

and after the giving of such notice and the payment or tender of the then delinquent and unpaid charges against such premises for such service and the cut-off charge, the city shall have no lien on the premises for charges for such services thereafter furnished, nor shall the owner, or the owner of a delinquent mortgage on, be held for the payment thereof: provided further, That such liens shall not be for more than four months' charges due or to become due, nor for any charges which have been due for more than four months."

The court held that the amending act of 1933, which became effective June 7, 1933, did not have a retroactive effect in that it did not destroy the rights the City had prior to its effective date; that the general statute of limitations did not apply to the charges for services furnished prior to June 7, 1933; and that no estoppel or waiver could be invoked against the City upon the ground that prior to the acquisition of ownership by HOLC the City had discontinued its services to the properties involved on two or more occasions because of delinquencies in the payment of its charges antedating June 7, 1933 and had later resumed the furnishing of its services without requiring the payment of said charges. The court therefore held that HOLC was not entitled to recover the charges for services furnished prior to June 7, 1933 which it had paid under protest so that it might be in position to sell or rent its acquired properties.



ADMINISTRATIVE ORDERS, REGULATIONS and OPINIONS

BANKING AND CREDIT

(Regulations F, amended May 3, 1940. 8 L.W. 825)

Regulations pertaining to trust powers of national banks amended with respect to participation in Mortgage Investment Funds--

Regulation F, pertaining to trust powers of national banks, is amended by the addition of a new subsection (d), relating to common trust funds composed principally of mortgages.

The moneys of a Mortgage Investment Fund shall be invested in obligations secured by real estate which, at the date of the investment, are legal for investment of trust funds under the laws of the state in which the bank is located, and which (1) are insured by the Federal Housing Administrator, or (2) are of the kind which might be acquired by national banks under the provisions for making amortized loans contained in the third sentence of Section 24 of the Act, or (3) are payable within 20 years and which either provide for semi-annual payments reducing the principal thereof annually or for amortization of the total unpaid principal amount of such mortgage by equal monthly payments.

INCOME TAX

(T.D. 4969, May 6, 1940. 8 L.W. 828)

Maryland or Pennsylvania ground rents are deductible as interest if ground rent is redeemable--

Section 19.23(b) - 1 of Regulations 103 is amended to provide for deduction of payments of Maryland or Pennsylvania ground rents if the ground rent is redeemable. The payments are to be treated as rent if the ground rent is irredeemable and in such cases are deductible only to the extent they constitute a proper business expense.

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Other rules, regulations, and administrative orders affecting housing construction or finance agencies are as follows:

CIVIL SERVICE COMMISSION: Published a notice of the condition of the apportionment at the close of business on April 30, 1940. See 5 Fed. Reg. 1639-40.

FARM CREDIT ADMINISTRATION: The Acting Secretary of Agriculture, by order filed May 2, authorized the Governor to designate, subject to the approval of the Secretary of Agriculture, the order of precedence of the Deputy Governors. See 5 Fed. Reg. 1628.

The Governor, by regulation filed May 13, designated the order of precedence of certain officers in exercising the authority of the Production Credit Commissioner. See 5 Fed. Reg. 1691.

FEDERAL HOME LOAN BANK BOARD:

Home Owners' Loan Corporation: The General Manager and General Counsel, by regulations filed May 1, prescribed the conditions for eligibility for persons or institutions acting as escrow agents. See 5 Fed. Reg. 1629.

RURAL ELECTRIFICATION ADMINISTRATION: The Administrator, by orders filed April 30, amended certain prior administrative orders by which funds had been allocated to designated projects. See 5 Fed. Reg. 1608-9.

The Administrator, by orders filed April 30, allocated funds to certain designated projects. See 5 Fed. Reg. 1609.

The Administrator, by order filed May 10, amended prior allocations for certain designated projects. See 5 Fed. Reg. 1684-5.

The Administrator, by order filed May 7, allocated funds to certain designated projects in Minnesota, Oregon, and South Carolina. See 5 Fed. Reg. 1656.

The Administrator, by orders filed May 4, amended prior allocations of funds for certain designated projects and allocated funds for other designated projects in Alabama, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Maine, Mississippi, Nebraska, Ohio, Texas, and Wisconsin. See 5 Fed. Reg. 1646-7.

The Administrator published a notice, filed May 20, amending previous administrative orders with respect to project designations mentioned therein. See 5 Fed. Reg. 1826-8.



SELECTED REFERENCES
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(The following list of current references, while by no means exhaustive, indicates the availability of material concerning legal problems regarding housing, and related documents.)

### BANKRUPTCY

Selected list of references on bankruptcy in U. S. with special reference to bankruptcy legislation, 1929-39; compiled by Grace Hadley Fuller. Jan. 2, 1940. /Processed. Title on cover reads: Bankruptcy in United States./ (Free to institutions only.) Library of Congress - Bibliography Division.

### CONTRACTS

"How Far Will a Court of Equity go to Enforcing a Moral Consideration"? A note by James M. Morita in discussing the doctrine that "equity will not aid a volunteer" - and the exceptions thereto. 28 Georgetown Law Journal 951-969 - (April, 1940).

### HOUSING

#### -Construction Requirements

##### -Colorado

Minimum construction requirements for new dwellings located in Colorado. Federal Housing Administration, Denver, Colo. Revised Mar. 1, 1940. (FHA form 2336). Federal Housing Administration FL2.11:C71

##### -Florida

Minimum construction requirements for new dwellings located in northern district of Florida. Federal Housing Administration, Jacksonville, Fla. Revised Mar. 15, 1940. (FHA form 2320). Federal Housing Administration FL2.11:F66/2

##### -Missouri

Minimum construction requirements for new dwellings located in western Missouri district. Federal Housing Administration, Kansas City, Mo. Revised Mar. 1, 1940. (FHA form 2310). Federal Housing Administration. FL2.11:M696

-Pennsylvania

Minimum construction requirements for new dwellings located in eastern Pennsylvania district. Federal Housing Administration, Philadelphia, Pa. Revised Mar. 1, 1940. (FHA form 2295). Federal Housing Administration. FL2.11:P38

-Laws

State Enabling Legislation for Public Housing. A report of the Legal Committee of the National Association of Housing Officials, 1940, 35 pp. charts. No. H16 - \$1.00.\*

An Index of Major Issues in State Decisions on Housing Authorities' Laws. A report of the Legal Committee of the National Association of Housing Officials, 1939, 18pp. No. H15 - 25¢.\*

Federal Housing Administration clip sheet, v. 22, no. 10 and 11; Mar. 12 and 26, 1940./1940/ Each 1 p. 11 large 4° (Biweekly. A corrected sheet pasted on issue of Mar. 26, no. 11). Federal Housing Administration. FL2.7:22/10,11

Definition of terms. (Revised) Dec. 22, 1939. /1940/ (Bulletin 17 /on policy and procedure/.). (This Bulletin brings USHA definitions up to date. Substituted for Bulletin 17, revised Jan. 31, 1939, and Addenda 1 and 2 thereof.) Federal Works Agency - Housing Authority. FW3.9:17

Demolition of Substandard Housing: Outline of Current Principles and Practice. 1938. 46 pp. No. H10 - 75¢\*

Housing and Welfare Officials Confer. Summary of the transcript of Proceedings of the Joint Conference of Housing and Welfare Officials, Chicago, May, 1939. 19pp. No. 67 - 25¢.\*

Housing Yearbook, 1940. The most important reference source on housing. Summaries of activities of federal, state, local and unofficial agencies; an over-all review of the year's developments; directory of agencies, etc. Indexed. 1940. No. H1940 - \$3.00.\*

(Volumes for 1935, 1936, 1937, 1938 and 1939 also available at \$1, \$2, \$3, \$3 and \$3 respectively.)

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\*Note - These documents are obtainable at the following address:  
Public Administration Service  
1313 East 60th Street  
Chicago, Illinois



Instructions to district supervisors, housing. (1940). iii/11p. (16th decennial census of United States (1940). Commerce Dept. - Census Bureau C3.940-6:H81/2

Instructions to enumerators, housing. (1940). iv/29p. (16th decennial census of United States /1940/ Commerce Dept. - Census Bureau. C3.940-6:H81

Local Housing Authority Administration: a Manual from Early Experience. Basic discussions of housing authority functions, organization and personnel. Issued in loose-leaf form to permit revision and addition of chapters on administrative procedure and finance, 1939, 126pp. mimeo. No. H14-\$2.50.\*

Low income housing area survey, supplement, circular presenting technique for preparation of summary tables to be derived from base tables. Prepared on housing projects utilizing low income housing area survey. Feb. 5, 1940. (Division of Professional and Service Projects, W. P. A. technical series. Research and records projects circular 2.) /Processed. Supplementary to WPA technical series. Research, statistical and survey project circular 9./ Work Projects Administration. FW4.18:2

Managing Low-Rent Housing: A record of Current Experience and Practice in Public Housing. A manual of management based on lectures and discussions at the training course conducted for housing managers by the National Association of Housing Officials in Washington in June, 1938. 1939, 289pp. Mimeo. No. H11 - \$2.00\*

Management programs. Dec. 28, 1939. (Bulletin 32 /on policy and procedure/. ) (Suggestions to local housing authorities for preparation and management programs.) Federal Works Agency - Housing Authority. FW3.9:32

#### -Miscellaneous

Master specifications for reconditioning (including repairing, rehabilitation, rebuilding, enlargements and demolition), under Corporation supervision. 3d edition, June, 1939. 1940. xxii/226p. (Appraisal and Reconditioning Division). Paper, 30¢. Home Owners Loan Corporation. FL3.9:Sp.3/939

Planning for Low-Rent Housing. A Non-Technical Guide for Local Housing Authorities. Outlines the collection and interpretation of information needed to formulate a comprehensive public housing program. 1938. 51pp.No. H9 - \$1.00.\*

Practical Standards for Modern Housing. A report of the National Association of Housing Officials' Committee on Physical Standards and Construction, 1939. 52pp. mimeo. No. H12 - \$1.00.\*

Public relations of Local Housing Authorities: a Committee Report on a Vital Function of Local Public Housing Agencies. 1939, 53pp. mimeo. No. H13- \$1.00.\*

Slum clearance. What does housing program cost? Simple presentation of facts about Federal Government's share in slum clearance and low-rent housing. (Mar. 1940). Federal Works Agency - Housing Authority.

FW3.2:H81/5

-Public

Estimates of average annual income and expense and determination of USHA annual contributions for USHA-aided projects. (Dec. 19, 1939.) (Bulletin 30 on policy and procedure.)

FW3.9:30

Public housing, weekly news from American communities abolishing slums and building low-rent housing, v. 1, no. 30-33; Mar. 5-26, 1940. (Issued with perforations.) Paper, 5¢ single copy, \$1.00 a yr; foreign subscription, \$1.80

FW3.7:1/30-33

Utility Rates for Public Housing Projects. A memorandum of the National Association of Housing Officials Legal Committee, 1940, 19pp. mimeo. No. H18 - 50¢.\*

MORTGAGES

-Foreclosures

Non-farm real estate foreclosures, Jan. 1940. Feb. 28, 1940. (1) p. 1 pt. 2 tab. 4<sup>o</sup> (Division of Research & Statistics). /Monthly. Processed/ Federal Home Loan Bank Board

FL3.8:940/1

-Insurance

Insured mortgage portfolio. v. 4, no. 9, Mar. 1940. /Monthly/ Paper, 15¢ single copy, \$1.50 a yr; foreign subscription \$2.10. Federal Housing Administration

FL2.12:4/9

Large scale rental housing insurance for mortgages in excess of \$100,000 (for new construction and rehabilitation projects), administrative rules and regulations under sec. 207 of title 2 of National Housing Act (as amended June 3, 1939). Mar. 1, 1940. (FHA form 2012). Federal Housing Administration

FL2.6:R20/2



Small scale rental housing insurance for mortgages not exceeding \$100,000 (for new construction and rehabilitation projects), administrative rules and regulations under sec. 207 of title 2 of National Housing Act, as amended June 3, 1939. Mar. 1, 1940. (FHA form 2012 (a).) Federal Housing Administration. FL2.6:R29

## PROPERTY

### -Condemnation

"Some Problems of Consequential Damages in Condemnation Proceedings." A note by Peter J. Brennan, Jr., in 28 Georgetown Law Journal 986-995 (April, 1940), discussing the matter of injuries consequent from and incident to the taking and the measure of damages.

## REAL ESTATE

### -General

Selected list of recent references on real estate business; compiled by Helen F. Conover. Jan. 1940. /Processed. Title on cover reads: Real Estate Business./ (Free to institutions only). Library of Congress - Bibliography Division.

## TAXES

### -Homestead

Exemption and Preferential Taxation of Homesteads. Classification and description of the laws of 13 states. 1939, 15pp. nineo. No. T21 - 50¢.\*

### -Personal

Exemption of Household Furnishings from Property Taxation. A summary of exemption laws applicable to this type of property. 1938. 2pp. nineo. No. T19 - 10¢.\*

### -Real estate

Enforcement of Real Estate Tax Liens and Constitutional Barriers to Remedial Legislation for Tax Delinquents in Each of the United States. Columnar charts, each 11 3/4" x 18". By Louis F. Alyea, 1939. 4pp. No. F38 - 35¢.\*

Enforcement of Real Estate Tax Liens. By Carl H. Chatters. 1928, 52 pp. No. 10 - 35¢.\*







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# · HOUSING ·

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# LEGAL DIGEST

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NUMBER 72-73

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"The job of Defense Housing Coordinator, under the direction of the National Defense Advisory Commission, is to supplement, not to supplant, any existing agency or service. It is for the period of the emergency only. . . .

"In doing the job, one primary objective will be to encourage the use of private capital. It is believed adequate safeguards can be added to the many already provided, and that even during these uncertain times it will be good business for private capital to handle the requirements in most instances. Where it is not available, fails to respond, or finds it impracticable to act with the promptness required by the emergency, then the government will have to do the job.

"The duty of the Coordinator and his staff, as outlined to me, is to see that sufficient housing--private, preferably, but if not, then public--is made available to meet emergency needs with such dispatch that National Defense does not suffer."

C. F. PALMER,  
Defense Housing Coordinator.

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
THE CENTRAL HOUSING COMMITTEE, WASHINGTON, D. C.

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## HOUSING LEGAL DIGEST

Issued monthly by the Sub-Committee on  
Legal Digest of the Central Housing  
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The Editors of the HOUSING LEGAL DIGEST endeavor to present as completely and impartially as possible material relating to housing legal problems: but they assume no responsibility for opinions expressed herein and no inference may be drawn as to their agreement or disagreement with viewpoints expressed.

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DECISIONS

BILLS AND NOTES - HOLDERS IN DUE COURSE

(U.S.D.C., D. Md., United States v. Shaeffer, June 12, 1940; 9 L.W. 2025.)

FHAdministrator acquiring insured note from finance company as authorized by National Housing Act is not holder in due course where note was endorsed without recourse to finance company by supply company taking note under similar endorsement from contractor and neither finance company nor supply company gave consideration.

A home owner wishing to purchase an oil burner delivered to a contractor his promissory note and an application for credit under the Act, both signed in blank. The blanks and those in the proposal and specifications were filled in by a representative of the company which was to supply the contractor. The latter instrument bore an assignment by the contractor of all his interest in the contract, but no consideration was given to the contractor. Before maturity of the note it was endorsed without recourse by the contractor to the supply company which, by like endorsement, transferred it to the finance company, its stamped endorsement bearing a printed notation stating the note was owned by the finance company. Proceeds of the note were paid to the contractor by the supply company, the voucher stating that it was a remittance from that company. Payment was refused by the home owner for alleged failure to comply with specifications, and after maturity the note was presented to the Administrator.

The Administrator's contention that the note was acquired from a holder in due course cannot be sustained as the finance company was the principal of the contractor and the supply company, and so charged with their knowledge concerning any defenses the home owner had to the note. Although a separate corporate entity, the finance company was a subsidiary of the supply company as shown by the provisions of the remittance voucher and the endorsement to it.

"To decide that a holder under the present circumstances is a holder in due course, would be to say that every commercial credit or loan organization could, merely by the creation of an affiliate or subsidiary, relieve itself of the ordinary obligations arising from contracts



of this kind, and could compel payment in all instances, regardless of what the original understanding of the parties may have been. Such a ruling would, we think, be unconscionable. The mere suggestion of it contradicts the asserted purpose of the government pursuant to which the note was given and the work undertaken, i.e., to assist, not to oppress, the home owner.

#### BUILDING AND LOAN ASSOCIATIONS

(Zeisler v. Interstate Building and Loan Association, Court of Errors and Appeals of New Jersey, 12 Atl. 2d 846.)

A building and loan association gave to plaintiff "income" shares in return for money advanced to it in order to meet its obligations. The shares were later exchanged for a promissory note of defendant. It was held that the transaction was a loan and not an outright purchase of shares and plaintiff is entitled to recover amounts advanced.

The defendant association was hard pressed in 1929 to meet its obligations. Pursuant to authority it sold some of its securities and otherwise sought and obtained money from plaintiff and others. On several occasions defendant obtained money from plaintiff and issued to plaintiff "income" shares. Later plaintiff demanded the money for these "income" shares and defendant gave to plaintiff its promissory note in return for the shares, payable one year from date, with interest. Plaintiff also loaned other money to defendant and received promissory notes for it. Finally plaintiff surrendered to defendant all of its notes and received one note for the entire amount due plaintiff. Suit was brought by plaintiff for the amount of this last note.

Defendant admitted that the advances made by plaintiff and for which it gave its promissory note were loans, and that they were liable as creditors for this amount. It denied, however, being liable for the amounts advanced in the purchase of the "income" shares. The defendant further stated that the notes which were given in exchange for the surrender of the "income" shares were improperly or illegally issued because they could only be matured or withdrawn in the manner prescribed by statute.

Plaintiff took the position that the money sued for represented loans which she made to defendant and that the "income" shares were merely issued as additional collateral for these loans.

The jury found that the monies turned in were loans and the Court of Appeals and Errors of New Jersey sustained this finding.

BUILDING AND LOAN ASSOCIATIONS - CONSTITUTIONAL LAW - PREPAID SHARES

(Veix v. Senaca Building and Loan Association of Newark, \_\_\_\_\_ N.J. \_\_\_\_\_, 13 Atl. 2d 796.)

A holder of prepaid shares in building and loan associations is a "creditor" of the association to whom the association owes a definite and limited obligation, and statutes providing for limited payment of withdrawal value are unconstitutional as to him.

The plaintiff purchased ten prepaid shares of the defendant association on October 7, 1931. On April 19, 1932, he gave written notice of the withdrawal of said shares and thereafter demanded payment of the withdrawal value of said shares and the interest due thereon.

The defendant refused to pay the full value of the shares except upon certain restrictions, claiming that it is operating under the New Jersey statutes of 1932 and amendments thereto. The plaintiff contends that these acts are unconstitutional insofar as they might affect his rights. Thus, the motion resolves itself into the question of the constitutionality of the various Acts of the Legislature regulating the manner of payments of the withdrawal values of shares of building and loan associations, insofar as they might affect the plaintiff's rights, and delegating powers to the Commissioner of Banking and Insurance under which the restrictive orders were issued.

The defendant contended that the alleged unconstitutionality of the Act of the Legislature as an abrogation of contractual rights was settled in the case of Bucsí v. Longworth Building and Loan Association, 119 N. J. L. 120, 194 Atl. 857. However, that decision does not apply to the present case, because here there is a demand for payment of prepaid shares after proper notice. In discussing the abrogation of the rights of a shareholder, the court, in the Bucsí case, supra, stated: "'But the statutory right of a member to withdraw from membership and to receive the withdrawal value of his shares and the statutory privilege to sue for the amount if not paid within the time named in the statute is based upon and forms a part of the general plan that each member is entitled to equal participation in the assets, and the statute does not contemplate that the privileges named shall be exercised to defeat equal participation, but that, the spirit of the statute being equal participation, the paramount equity is equal participation at all times.'" In the present case the plaintiff is a holder of prepaid stock. His certificate recites that the shares shall bear interest at 6% per annum, and that the shares may be called in and cancelled at any time, by the association, upon payment of the par value and accrued interest; that in the event of surrender or cancellation, the owner shall receive no more and no less than the par



value and accrued interest. It appears then, that the plaintiff, as a holder of prepaid shares, was not a participant in the assets of the association, either in time of liquidation, or in its profits.

The court recognized this difference in the Bucsí case, *supra*, and stated: "The appellant argues that the statute also provides for a preference to holders of matured shares over withdrawing shareholders. The statute gives a priority to a matured shareholder but it only recognizes a preference which the matured shareholder had as a creditor. This court held in *Cunningham v. Mutual Loan & Building Association*, 72 N.J.L. 175, 180, 62 A. 307, that when the maturity of shares has been declared in the manner prescribed by the scheme of the constitution of the association, and that it had been recognized by the association by its officers, that thereafter a holder of the matured shares became a creditor of the association, entitled to receive the money, provided the funds arising from the appropriation of one-half the receipts of the association should be sufficient for such payment.

"The statute works no apparent change in the status of a matured shareholder and the preference necessarily only applies to the shareholders whose shares have been matured in the prescribed manner and who have filed the statutory notice prior to the notice of withdrawal. It leaves the status of the parties unchanged."

In the present case the position of the plaintiff is even stronger than that of the matured shareholder. "As a holder of prepaid shares, the obligation between him and the company was definite and limited. He was, in view of the decision in the Bucsí case, *supra*, as this court understands it, a creditor, and to apply the provisions of the legislative act in question to the case of the present plaintiff would be unconstitutional. It appears, therefore, that the restrictive provisions of Chapter 102, Laws of 1932, cannot constitutionally be applied as against a withdrawing shareholder of prepaid shares in a solvent association."

The next question is whether or not the refusal of the defendant to make the payment in question is justified, under the restrictive orders of the Commissioner of Banking and Insurance. The restrictive orders were issued under the Laws of 1933 and amendments thereto. They gave the Commissioner of Banking and Insurance the power "from time to time, to make orders for the purpose of conserving the assets of the building and loan associations of this state, which orders shall have the same force and effect as law and be binding on any and/or all building and loan associations of this state, whereby: (a) to regulate the method of paying the withdrawal value and/or maturity value of shares of any and/or all of such associations."

The court held that the delegation of power in this case was unlimited, indefinite and uncontrolled, and therefore an unconstitutional delegation of power.

On application for motion to reargue, the court stated, in its opinion, that its decision as hereinbefore made would stand unchanged.

BUILDING AND LOAN ASSOCIATIONS - TAXATION - FEDERAL INSTRUMENTALITIES

(Texas Unemployment Compensation Commission et al v. Metropolitan Building and Loan Association et al. Court of Civic Appeals of Texas, 139 S.W. 2d 309.)

State and Federally chartered building and loan associations are not exempt from the Texas state unemployment compensation laws. They are not "Federal instrumentalities" exempt from contributions or taxes imposed on employers by state unemployment compensation laws.

The appellees, ten building and loan associations, seven state-chartered associations and three Federally chartered associations, instituted this proceeding to perpetually enjoin and restrain appellants, the Texas Unemployment Compensation Commission and the Attorney General, from by civil suit, criminal prosecution, or otherwise; attempting to enforce the provisions of the Texas Unemployment Compensation Act against them, upon the ground that each of them was, and is now, an instrumentality of the United States and as such is by the Texas Unemployment Compensation Act specifically exempted from its provisions. The Court of Civil Appeals of Texas held that these associations were subject to the Unemployment Compensation Act and stated in part:

"We have reached the conclusion that the trial court erred in holding that appellees are each an instrumentality of the United States within the meaning of that term as used in Section 19(g)(6) of the Texas Unemployment Compensation Act, as amended by Acts 1937, c. 67, sec. 7 Vernon's Ann Civ. St. art. 5221b--17, the material portion of which reads as follows:

"The term "employment" shall not include: . . .

"(B) Service performed in the employ of any other State or its political subdivisions, or of the United States Government, or of an instrumentality of any other State or States or their political subdivisions or of the United States."



Seven of the associations are state-chartered associations and are members of the FHLB of Little Rock, Arkansas. The other three associations are Federally-chartered associations. Each of the ten associations may be created fiscal agents of the government, but only the three Federally-chartered associations have actually been designated as such.

" . . . At the time of the trial of this case below the Internal Revenue Department had ruled that all state banks, which had become members of the Federal Home Loan Bank or the Federal Reserve System, were instrumentalities of the United States Government and as such were exempt from the payment of the excise taxes imposed on employers under the Federal Social Security Act. The learned trial judge cited this ruling in support of his conclusion that appellees are instrumentalities of the United States Government and as such are exempt from the provisions of the Texas Unemployment Act. However, since the trial below, the courts of three states have held that member state banks of the Federal Home Loan Bank and member state banks of the Federal Reserve System, which are required under such membership to act in certain matters as depositories and fiscal agents of the Federal Government, are not 'Instrumentalities' of the United States Government, and are not exempt as 'federal instrumentalities' within the meaning of that term as used in the several state unemployment compensation acts which are identical or similar to ours. *Capitol Building & Loan Association v. Kansas Commission of Labor, etc.*, 148 Kan. 446, 83 P. 2d 106, 118 A.L.R. 1212; *North Carolina Unemployment Compensation Commission v. Wachovia Bank & T. Co.*, 215 N.C. 491, 2 S.E. 2d 592; *Western Bank & Trust Co. v. Unemployment Compensation Commission of Ohio* (Court of Appeals) not designated for publication.

"The relationship of state banks, which have complied with pertinent state and federal laws and have become members of the Federal Home Loan Bank or the Federal Reserve System, to the Federal Government is entirely parallel with and in every respect similar to the relationship of state-created building and loan associations, which have complied with pertinent state and federal laws and have become members of the Federal Home Loan Bank. In consequence, the decision in the cases above cited, holding that such state banks are not instrumentalities of the Federal Government within the meaning of the similar unemployment compensation laws of those states are applicable to the instant case, and require the holding that building and loan associations created under state law, do not become 'federal instrumentalities' exempt from contributions or taxes imposed on employers by state unemployment compensation laws, merely because such state-created building and loan associations have complied with pertinent state and federal laws, and have become members of the Federal Home Loan Bank, or because of their consequent relationship thereto under pertinent state and federal statutes.

"We agree with the above-cited decision of the courts of sister states, which by reasonable analogy is decisive of the question that the appellee state-created building and loan associations are not 'federal instrumentalities' exempt from the operation of the Texas Unemployment Compensation Act.

"We have also reached the conclusion that the three appellee federal associations are not instrumentalities of the United States Government, and are not exempt from the operation of the Texas Unemployment Compensation Act.

"These federal associations were organized under Chap. 12 of Title 12 of the U.S.C.A., known as the Home Owners' Loan Act of 1933, which provides for the creation of a federal agency or instrumentality known as the Home Owners' Loan Corporation, and in Section 1464(a) provides for the creation or organization of voluntary Federal Savings and Loan Associations, which shall, upon their organization 'automatically' become members of the Federal Home Loan Bank, which was created as a federal agency under Chap. 11, Title 12 of the U.S.C.A., known as the Federal Home Loan Bank Act. These federal associations are organized primarily for profit of their stockholders, the idea, purpose and character of such federal associations being set forth in Section 1464(a) of Chap. 12 Title 12 U.S.C.A., as follows: 'In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes; the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.'

"By no language does either Chapters 11 or 12 of Title 12 U.S.C.A., designate the federal associations as agents or instrumentalities of the Federal Government, but these statutes merely provide that such federal associations shall, upon organization, 'automatically' become members of the Federal Home Loan Bank; and that such membership merely makes them fiscal agents of the Federal Government if and when called upon by federal authorities to act.

"It may be also here observed that such federal associations render no different service for the Federal Government from that required of the state-created associations which become members of the Federal Home Loan Bank. In the area in which the federal associations operate, they are competitors of the state-created associations operating in the same area, and both the state and federal associations are



organized to do substantially the same thing and for profit to their shareholders. Both the state and the federal associations are voluntary or permissive, and are not wholly owned by the Federal Government, and both enjoy the same incidental privileges and owe the same duties to the Federal Government as members of the Federal Home Loan Bank. And as strong evidence that Congress did not regard the federal associations as instrumentalities of the Federal Government, exempt from state taxation, it specifically authorized states and other taxing authorities to tax them. See Sec. 1464(h), Chap. 12, Title 12 U.S.C.A., which, after providing the manner in which the Federal Government might tax such associations, further provides: ' . . . no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.'

"Thus it is manifest that Congress did not intend to make federal savings and loan associations instrumentalities of the Federal Government, exempt from state taxation, but to the contrary expressly authorized states to tax them in the manner provided. The state, in the instant case, is by its Unemployment Compensation Act attempting to do the very thing Congress authorized. That is, it seeks to impose an excise tax upon both state and federal building and loan associations, which excise tax on the federal associations is not 'greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions'.

"The basic reasons or grounds for holding the state-created associations not 'federal instrumentalities' are applicable to federal associations. That is, both the state and federal associations are organized, owned, and operated for profit of their shareholders. As members of the Federal Home Loan Bank each enjoys the same incidental privileges conferred and each must perform the duties imposed by the Federal Government. Neither is owned by the Federal Government, and although each does promote governmental policy, that fact does not convert either of these private institutions into an 'instrumentality of government' of the United States within the meaning of that term as used in the Texas Unemployment Compensation Act."

#### BUILDING AND LOAN ASSOCIATIONS - TRUSTS

(In re Locarno Building and Loan Association, Court of Chancery of New Jersey, 13 Atl. 2d 791.)

A trustee cannot legally fix the amount of his own allowance or pay himself out of the trust estate until so

directed by the court. Trustees of a building and loan association in liquidation are trustees and not directors and are subject to the law of trusts and not to the law of corporations.

The three trustees of the Locarno Building and Loan Association presented to the court their second annual account and asked the court to approve the same and to allow them compensation for their services.

The three trustees, who were an attorney, former secretary of the solvent association, and a real estate broker, divided the duties of the liquidation among them and also, without leave of the court, made certain payments to themselves for services performed in accordance with their division of labor. The trustees requested that the court approve these expenditures and also asked for further compensation. The court approved their account but denied them further allowance on the ground that it was improper for them to have paid themselves as they did. The court stated:

"The trustees of a building and loan association in liquidation are trustees and are not directors of a corporation. Their relation to the trust fund is governed by the law of trusts and not by the law of corporations.

"By the common law rule, a trustee is supposed to give his services gratis and is not entitled to compensation. Warbass v. Armstrong, 10 N.J.Eq. 263. Nowadays, either by the terms of the trust agreement, or by statute, compensation is usually given him. But unless it be so specified by the agreement, or by statute, a trustee cannot legally fix the amount of his own allowance or pay himself out of the trust estate until so directed by the court. The statute governing the liquidation of building and loan associations expressly provides that the court of chancery shall allow reasonable compensation to the trustees for their services. R.S. 17: 12-88, N.J.S.A. 17: 12-88. It was entirely improper for the trustees to pay themselves as they did. If the trustees had not done so, I would probably allow them about 10 percent. of the gross income collected, \$368, plus  $1\frac{1}{2}$  percent. of the average book value of assets on hand in the accounting period, \$808, or in all \$1,176. That allowance would have covered all special services rendered. The account will be approved but, since the trustees have paid themselves without authority, their application for an allowance will be denied.

"In justice to the trustees, I add that they have carefully administered their estate and that they intended no wrongdoing in the matter above discussed."



CONTRACTS - CONSIDERATION

(Milton Roe Sabin et ux v. HOLC; Supreme Court of Oklahoma. Decided in May 1940.)

Promise to pay or payment of past due installments is not sufficient consideration to support agreement of mortgagee not to foreclose. In Oklahoma the overruling of motion for new trial relates back to original foreclosure judgment and order of sale may issue at expiration of six months after entry of original judgment. Mere inadequacy of price will not prevent confirmation of foreclosure sale. HOLC not required to pay mortgage tax levied by State of Oklahoma.

In an HOLC foreclosure suit the defendants filed an answer pleading among other things that on September 10, 1936, while they were in default, they entered into an agreement with HOLC that they would on October 10, 1936, pay two monthly installments, i.e., \$115.18, and in addition would pay \$100.00, making a total of \$215.18, and would continue thereafter to pay two installments per month until the account was in good standing. They further alleged that they complied with this agreement but that HOLC breached it by prematurely instituting the foreclosure suit and that by reason of the suit defendants had been damaged in the sum of \$7500. HOLC demurred to this part of the answer. At the trial its demurrer was sustained and the case was then tried on the general issue included in defendants' answer. The court directed a verdict for HOLC and from an order overruling a motion for new trial and the foreclosure judgment, the defendants appealed to the Supreme Court of Oklahoma.

The Supreme Court held that the trial court had not erred in sustaining the demurrer of HOLC to that part of the answer hereinabove set out. In so holding the court said:

"It will be noted that at no place do defendants allege there was a new consideration for the alleged extension agreement. On the contrary the pleading shows the only change in their obligation under the original contract was to pay \$100 plus two monthly installments on October 10, 1936, and two monthly installments during each successive month until all monies past due under the terms of the original agreement were paid.

"In state ex rel West, Atty. General v. City of Sapulpa, 58 Okla. 550, 160 P. 489, it was held: 'Where an original contract does not contemplate the making of a subsequent supplemental agreement, the original consideration will not support such subsequent agreement, and

a subsequent supplemental agreement not forming a part of the original contract or supported by the original consideration thereof, or a new consideration, is void as between the parties.'

"The entire debt was past due at the time of the alleged extension agreement.

"The defendants neither paid nor agreed to pay any more than they were under obligation to pay at that time according to the terms of the note and mortgage. Consequently there was not a sufficient consideration passing from defendants to plaintiff to support the alleged extension agreement. The paragraphs of the answer here involved did not set out facts sufficient to constitute a defense. *Maker v. Taft et al*, 41 Okla. 663, 139 P. 970, 52 LRA ns 328; *Caine et al v. Munger*, 48 Okla. 24, 149 P. 1086; *Frederick v. Tabor*, 96 Okla. 99, 221 P. 505; *Pound v. Campbell*, 174 Okla. 331, 49 P. 2nd 1088; 85 A.L.R. 327.

"In support of the above contention, defendants rely primarily upon the case of *Minnehoma Oil Co. v. Koons*, 99 Okla. 266, 226 P. 1048. But a careful reading of that opinion discloses that, after holding parol testimony is admissible to prove an oral, executed agreement entered into subsequent to a written agreement between the parties, the court: ' . . . it is competent to prove a new and distinct agreement upon a new consideration . . .'. This authority of defendants instead of being at variance with, actually sustains the action of the trial court. Their remaining authorities are not in point. The demurrer was properly sustained."

The court passed upon another question, as follows: Judgment of foreclosure was rendered January 10, 1938, and the motion for new trial was overruled February 9, 1938. Notice of appeal was given, but no supersedeas bond was executed. An order of sale was issued July 18, 1938; the sheriff's sale was held August 19, 1938; motion to confirm was filed August 23, 1938; the sale was confirmed September 9, 1938, and defendants gave notice of appeal therefrom. In the meantime, August 8, 1938, defendants filed an appeal from the judgment of foreclosure. Upon these facts the defendants contended that the sale was premature because six months had not elapsed since the motion for new trial was overruled. The court held that because the defendants furnished no supersedeas bond execution of the foreclosure judgment had not been stayed by the notice of appeal; that no sale of the property could be had for a period of six months because the mortgage provided for waiver of appraisal; but that the overruling of the motion for new trial related back to the original foreclosure judgment and that six months from the date of the original judgment (January 10, 1938) had expired when the order of sale was issued on July 18, 1938. The court therefore overruled the contention of the defendants that the foreclosure sale was premature.



Defendants also contended that the price, \$4,000.00, at which HOLC bid in the property was inadequate and that the sale should not have been confirmed. The court pointed out that there was no showing of a probable higher bid at a resale, that there was no claim of unfairness, fraud, improper conduct or other irregularity and that defendants were present at the sale, and held that mere inadequacy of price was not sufficient to prevent confirmation of the sale.

Finally the court held that the fact that the mortgage tax had not been paid did not prevent the foreclosure because HOLC, an instrumentality of the United States Government, was not subject to the mortgage tax levied by Sections 12351 et seq., O.S. 1931, Title 68 Okla. St. Ann., 1171 et seq., citing HOLC v. Anderson, 145 Kan. 209, 64 P. (2d) 14 and Pittman v. HOLC, 84 L.Ed. 16.

#### COVENANTS - PRIVATE RESIDENCES

(Fox et al v. Sumerson et al. \_\_\_\_ Pa. \_\_\_\_, 13 Atl. 2d 1.)

Altering the interior of a private dwelling house so as to create two apartments is violating the provisions of a deed limiting the use of the house to a single family.

The defendants applied for and were granted a permit to make certain alterations to their property. The alterations made were the construction of a bathroom on the first floor of their private home and the construction of a kitchen on the second floor. These alterations provided for a home that two families could live in instead of one. The plaintiffs obtained an injunction to prevent the use by defendants of their premises for purposes "other than as a private dwelling house for the use of a single family", as contained in defendant's deed to the property. No changes were made to the exterior of the premises.

The Pennsylvania Supreme Court upheld the injunction of the lower court and found that the use of the home, as altered, would be in violation of the deed permitting the use for a single family only. The court said:

"The facts of this case are so closely related to the facts in Taylor v. Lambert, 279 Pa. 514, 124 A. 169, 170, as to make our decision in that case controlling here. In that case the restriction limited buildings to be erected to 'a private dwelling house'. We held that the erection of 'an apartment house' on the restricted land would be violative of the restriction. We said: 'An apartment house is not a number of private dwellings, built one upon another, but a collection of dwellings. . . . An apartment house is not strictly a private

dwelling; it is a place for housing a number of people grouped in families assigned to different sections in the same structure.' We declared that the restriction of land to the erection of 'a private dwelling house' is violated 'by three families living separate and apart' in the same building, citing *Levy v. Schreyer*, 27 App. Div. 282, 50 N.Y.S. 584, 586. We said further: 'The distinction between a private dwelling house or a private residence on the one hand and a house built or occupied as a residence for two or more families is quite obvious. In the one case it is single, private, and personal; in the other it is a sort of tenement affair. While the families occupy separate apartments distinct from each other, they are not private residences as the term is ordinarily understood.' . . .

"In *Koch v. Gorrufflo*, 77 N.J.Eq. 172, 75 A. 767, 768, 140 Am. St. Rep. 552, the Court of Chancery of New Jersey held that a covenant by a grantee not to use the premises for any other purpose except for a private residence, is violated by constructing a dwelling house designed to accommodate two families and allowing two families to occupy the same. In that case Vice Chancellor Howell said in substance that a house occupied by two or more families is a community house; 'the families living there occupy apartments separate and distinct from each other and the house becomes not a private residence . . . but a collection of apartments leased to different tenants, and if the defendant may be allowed to put two families in her house where shall she stop? She would be as well entitled to put a family in each room and then claim that her property was being occupied as a private residence. The covenant in question gives no such privilege.' So also *Pocono Manor Ass'n v. Allen et al.* Pa. Sup., 12 A. 2d 32, filed March 25, 1940."

#### EMINENT DOMAIN - CONSTITUTIONALITY

(The Housing Authority of the City of Dallas et al v. Higginbotham et al.; \_\_\_\_\_ Texas \_\_\_\_\_, June 26, 1940.)

The Texas Housing Authorities law is constitutional. Slum clearance and low-rent housing are public uses and purposes. Housing authorities may condemn property not in a slum area if for the purpose of providing safe and sanitary dwelling accommodations for persons of low income.

The Supreme Court of Texas held that (1) the use to which the housing projects will be devoted is a "public use" and therefore it follows that the grant in the Texas Housing Authorities Law of the power of eminent domain does not violate Art. 1, Sec. 17 of the Constitution of Texas which limits taking of property to a public use; (2) that the primary purpose of the Housing Authorities Law is to eliminate slums,



from which the entire community derives a benefit through the elimination of conditions giving rise to crime and disease, and is not in violation of Art. 1, Sec. 3 of the Constitution which prohibits special privileges to individuals not in consideration of public services; (3) that the legislature has made no attempt to grant special privileges to any man or set of men, but has made a reasonable classification of the members of the public and has provided that such low-rent dwelling accommodations shall be available to all members of the public who presently or in the future fall within the classification made by the legislature, and it necessarily follows that the law does not violate sections 52 and 53 of Article 3 of the Constitution which deny the authority of the legislature to grant public money or thing of value to individuals without constitutional authority; that the Housing Authorities Law, which in connection with the duties devolving upon the local authority gave certain definitions and laid down certain standards for the guidance of the authority in the exercise of its powers and the performance of its duties, is not an invalid delegation of legislative power in violation of Section 1 of Article 2 of the Constitution of Texas; that provision of the Texas Housing Authorities Law that "the property of an authority is declared to be public property used for essential public and governmental purposes and such property of an authority shall be exempt from all taxes and special assessments of the city, the state or any political subdivision thereof" is not violative of Sections 1 and 2 of Article 8 of the Constitution of Texas concerning equal and uniform taxation; and that the legislature in the Texas Housing Authorities Law in conferring the power of eminent domain on the authority in the following language,

"An authority shall have the right to acquire by the exercise of the power of eminent domain any real property which it may deem necessary for its purposes under this act, after the adoption by it of a resolution declaring that the acquisition of the real property described therein is necessary for such purposes",

does not limit the exercise of the power to property situated in a slum area.

EMINENT DOMAIN - CONDEMNATION AWARDS - APPEAL

(Housing Authority of City of Newark v. Ryan, et al., Court of Chancery of New Jersey, 13 Atl. 2d 850.)

The pendency of an appeal from the award of condemnation commissioners is not a sufficient ground for paying the award into court instead of to the land owners.

This was a petition by the Housing Authority of Newark against defendants for leave to pay into court, pending an appeal, the amount of an award made by commissioners in condemnation proceedings. The defendants moved to dismiss the petition on the ground that it did not show facts sufficient to justify payment into court rather than to the defendants themselves.

The court held that there was no reason why the Housing Authority should not pay the award directly to the land owners rather than to the court, even though there was an appeal pending. The court said in part:

"The most important result that flows from payment, whether to land owner or into court, is that the condemning authority may immediately take possession of the land. R.S. 20:1-12, N.J.S.A. 20:1-12. Payment may be made and the land may be taken despite the appeal. The statute contemplates that the money may be paid to the land owner, rather than into court, pending appeal and gives petitioner a remedy in the event that the amount found by the jury shall be less than that awarded by the commissioners. The petitioner may have judgment and execution for the excess. R.S. 20:1-23, N.J.S.A. 20:1-23.

"The provisions of title 20 of our revised statutes apply equally to public and private corporations having power to take land for public use. R.S. 20:1-1, N.J.S.A. 20:1-1. No distinction is made in R.S. 20:1-15 and R.S. 20:1-24, N.J.S.A. 20:1-15 and 20:1-24, between public and private corporations. This makes most pertinent what was said by Justice Dixon in *Jersey City v. Hamilton*, 70 N.J.L. 48, 56 A. 670, 672, concerning the statutory authority of a municipality to take land. 'The authority thus conferred is given to private and to public corporations in the same words. Under our Constitution it cannot be conferred upon private corporations unless compensation be first made to the owners, and this means "that the money" (paid as compensation) "shall become theirs absolutely, and that they shall have the same dominion over it that they had over the land before it was taken, and nothing short of this will satisfy the constitutional requirement." *Pennsylvania R. Co. v. National Docks & N. J. J. C. Railway Co.*, 53 N.J.Eq. 178, 193, 32 A. 220. The language of the statute must therefore be read in this sense with regard to private corporations, and the act contains no intimation of any distinction in this regard between private and public corporations. Hence the conclusion naturally follows that the right of the landowners to the money paid is intended to be as absolute and indefeasible as the right of the corporations to the possession of the land.'

"The purpose of petitioner in paying the money into chancery is to prevent it from coming under the control of the landowners.



Petitioner wants it held pending the appeal so that if the award be reduced, petitioner may be paid the excess out of the fund in court and not have to rely on a judgment against the landowners. But the legislature has no authority in the case of a private corporation to direct payment of the award into court, there to abide the result of the appeal and meanwhile give the condemning corporation the right to take possession of the land. *Redman v. Philadelphia, M. & M. Railroad Company*, 33 N.J.Eq. 165; *Packard v. Bergen Neck Railway Company*, 48 N.J.Eq. 281, 22 A. 227. Since the statute makes no distinction here between public and private corporations, the legislature cannot be supposed to have intended to authorize a public corporation to pay the award into court, there to await the outcome of the appeal.

"I have not overlooked R. S. 20:1-29, N.J.S.A. 20:1-29, which preserves in general terms any right which has been or may be granted to any public agency to take property in advance of making compensation therefor. Petitioner, however, does not show that any such right has been granted to it. The mere pendency of an appeal from the award of the commissioners is not a sufficient ground for paying the money into court. Petitioner can safely pay the defendants. Let there be an order directing the clerk to repay the fund to the petitioner and dismissing the petition."

EMINENT DOMAIN - JURY AWARDS IN EXPROPRIATION CASE

(*Housing Authority of New Orleans v. Weis et al* \_\_\_\_ La. \_\_\_\_, 196 So. 328.)

An appellate court will not disturb the verdict of a jury in an expropriation case unless the amount granted is manifestly erroneous.

The plaintiff instituted condemnation proceedings to obtain from the owner property for the construction of a low-rent housing project. The jury awarded a sum of money for the land and judgment was rendered by the district court for that amount.

The defendants appealed the verdict of the jury and the court, in citing a long list of cases stated that "the law is clear that the Appellate Court will not disturb the verdict of a jury in an expropriation case unless the amount granted is manifestly erroneous". However, the court found in this case that the defendants had not been awarded a fair valuation of their property and amended the judgment by increasing the amount awarded to defendants.

HOMESTEAD RIGHTS

(Exchange National Bank of Tulsa v. Rose et ux, \_\_\_\_Okla. \_\_\_\_, 103 Pac. 2d 496.)

The right of selection of a homestead is in the owner and the fact that he rents the property upon which he claims the homestead will not destroy his homestead rights.

The defendants acquired title to a 5-acre tract of cultivated land and later to another tract of 28 acres, upon which they have continuously resided. The two tracts of land were not connected to each other. They filed an instrument in the office of the county clerk declaring that they had selected both of these tracts as their homestead. They have not cultivated either of these properties, but rent them out. They live on the largest tract and the money they obtain for the rental of the land is used for sustaining the family.

The plaintiff had obtained a judgment against the defendants which had been kept alive by execution issued from time to time. In 1938 the plaintiff caused an execution to be issued under said judgment and levied upon the 5-acre tract above mentioned. The sheriff sold the tract to plaintiff even though defendants notified the sheriff that they claimed this 5-acre tract as part of their homestead. The plaintiff attempted to have this sale confirmed and defendants objected. A judgment was granted in favor of defendants upon their claim of homestead exemption, and plaintiff appealed. The plaintiff contended that since the evidence showed that the defendants had never resided upon or cultivated the 5-acre tract themselves but had rented it that they were precluded from claiming said tract as part of their homestead. In affirming the judgment the court said:

"Under the Constitution (section 1, art. 12, Okl. St. Ann.) and the statute (section 1643, O.S. 1931, 31 Okl. St. Ann. section 2) a homestead outside of any city, town or village may consist of one or more tracts to be selected by the owner where the total does not exceed 160 acres. The right of selection is in the owner. Morey v. James, 118 Okl. 277, 248 P. 594. This right may be exercised at any time the necessity for making such selection arises (Elliott v. Bond, 72 Okl. 3, 176 P. 242, 991); and the question as to whether a tract or tracts have been selected and impressed with the homestead character is a question for the court or jury to determine under the facts and circumstances of the particular case. Orwig v. Cloud, 109 Okl. 299, 233 P. 1085; Kerns v. Warden, 88 Okl. 297, 213 P. 70. As said in the case of Williams, Sheriff v. Watkins, 93 Okl. 112, 219 P. 643:

'Where more than one tract or parcel of land is claimed as the homestead under section 1, article 12, of the Constitution, the proof must show actual occupancy or express intention to occupy one tract or



parcel, and facts and circumstances of using the other parcel or parcels or an intention to use the other parcel or parcels in connection with the occupied parcel in the interest and for the benefit of the family.'

"Since the uncontroverted evidence herein shows that both the tract upon which the defendants in error resided and the tract upon which the levy had been made were used in the interest and for the benefit of the family of the defendants in error although both were cultivated by a tenant, we are of the opinion that there is competent evidence in the record to sustain the finding of the trial court that both tracts constituted the homestead of the defendants in error. We know of no law which prevents the owner of a rural homestead from cultivating or operating the same through the medium of a tenant and accepting a cash rental in lieu of a portion of the products of the soil. Any other construction we are of the opinion would be narrow and contrary to both the letter and spirit of the Constitution and Statutes of this State. The judgment of the trial court is supported by the evidence and presents no error of law."

#### HOMESTEAD RIGHTS

(Sipe v. Sayer et al., Court of Civil Appeals of Texas, 140 S.W. 2d 297.)

In order to impress upon property a homestead character, in the absence of actual occupancy thereof, there must be an intention by the head of the family to reside upon it with his family as a home, coupled with some overt act of preparation evidencing that intention. Mere intention alone is not sufficient.

G. T. and W. R. Sipe brought this action against defendants to enjoin the sale under execution of certain lands belonging to plaintiffs. The court enjoined the sale as to the land owned by G. T. Sipe, but refused to enjoin the sale of land owned by W. R. Sipe. The Court of Civil Appeals of Texas affirmed the lower court's decision and stated:

"The temporary injunction appears to have been refused by the trial court as to W. R. Sipe for the reason (as evidenced by the court's findings of fact) that the 140 acres of land, levied upon by virtue of the Sayer execution and claimed by W. R. Sipe as his homestead, was not his homestead because, although W. R. Sipe had the intention to make said tract his homestead, there was no evidence of occupancy or overt acts or preparation of said land for use as a home, and proof alone of intention to occupy the land as a home was insufficient to establish its homestead character. Such a conclusion is sustained by the

authorities. In *Gilmore v. Dennison*, 131 Tex. 398, 115 S.W. 2d, 902, our Supreme Court said: ' . . . the rule has been established that in order to impress upon property a homestead character, in the absence of actual occupancy thereof, there must be an intention by the head of the family to reside upon it with his family as a home, coupled with some overt act of preparation evidencing that intention. Mere intention alone is not sufficient'. See also *Stevenson v. Wilson*, Tex. Civ. App., 130 S.W. 2d 317, writ ref. . . .

"It has been definitely established that a man who resides with his family upon a jointly owned tract of land with his co-tenants may acquire a homestead exemption in his undivided interest in the entire tract of land, and that upon partition his homestead exemption vests immediately in that part of the entire tract that is allotted to him, and this is true even though such person has never actually resided upon the part allotted to him by the partition. [citing cases.]

"It is apparent from a study of the petition that facts are not alleged sufficient to bring the case within the purview of such decisions. Had appellant lived with his wife upon the 420-acre tract of land with his mother and brothers and used and occupied it in such manner as to establish his homestead rights in his undivided interest in the entire tract, upon partition to him of the west 140 acres, he might have established that the west 140 acres was his homestead, despite the fact that there was no house on that tract and he had never actually resided thereon. . . ."

#### HOMESTEAD RIGHTS

(*Dirks v. Venenga*, \_\_\_\_\_ Iowa \_\_\_\_\_, 292 N.W. 841.)

A sheriff has no power to set aside a homestead where none exists, nor to create one by the act of platting.

The plaintiff was at one time the owner of 80 acres of land. The superintendent of banking had a judgment against the property and later it was sold. Defendant acquired title from the superintendent of banking.

Before making the sale the sheriff platted a homestead in the 80 acres, although the plaintiff was notified but failed to do so. Notwithstanding the so-called homestead, the sheriff sold the whole 80 acres. The trial court found that the plaintiff had never used or occupied the property set aside as a homestead by the sheriff and that the setting apart and platting of a so-called homestead was a mistake on the part of the sheriff.

The Supreme Court of Iowa said, "He [the sheriff] has no power to set aside a homestead where none exists, nor to create one by the act of platting as was done here."



HOUSING - CONSTITUTIONAL LAW

(Lott et al v. City of Orlando, \_\_\_\_ Fla. \_\_\_\_, 196 So. 313)  
When City of Orlando, under statutes relating to municipal housing authorities, established a housing authority to carry out housing projects for people of low income class, it was action taken for a "public purpose" within meaning of the law.

Plaintiffs brought this suit against defendant to restrain it from making contributions to a municipal Housing Authority and complying with an agreement to furnish the Housing Authority certain municipal services and facilities for housing projects. From an order sustaining defendants' motions to dismiss the bill, the plaintiff appealed.

In affirming the decision of the lower court the court held (1) that the action of the City of Orlando under statutes relating to municipal housing authorities, (Chapters 17981, 17982, Act. No. 275, General Laws of 1937 approved June 1, 1937, as amended) in establishing a housing authority to carry out housing projects for people of low income class, was action taken for a "public purpose" within meaning of the law; (2) that the constitutional and statutory provisions relating to duty of counties to provide for certain classes of indigents in Florida (Constitution, Art. 13, § 3) did not preclude City of Orlando from, under Statutes concerning housing authorities, entering into arrangement with a municipal housing authority for the construction of housing projects to eliminate unsanitary and unsafe dwelling accommodations for families of low income class; (3) that the statute concerning the area of operation of municipal housing authorities and authorizing them to act a certain number of miles beyond the territorial borders of cities does not violate principle of equality and uniformity of taxation as provided by Constitution (Art. 9, §§ 1, 5) on theory that money collected, by way of taxes, from property owners within a city's corporate limits may be applied to maintenance of housing authority property located beyond city limits; (4) that expenditures of taxpayers money made by municipality for a housing authority to provide sanitary and safe dwelling accommodations for persons of low income class, are for a "public purpose" within contemplation of constitutional provision regarding imposition of taxes by counties and incorporated cities (Constitution, Art. 9, § 5); and (5) that a housing authority of City of Orlando could not control or exercise municipal authority of the City within city's corporate charter limitations.

HOUSING

(Riggin v. Dockweiler, et al, \_\_\_\_ Cal. \_\_\_\_, July 16, 1940.)  
The California Housing Authorities Law does not require that a new housing project be located in a slum area. Under the terms of the federal and state statutes, a housing project may be built in any location deemed desirable by those charged with their administration.

The Supreme Court of California held that under the Housing Authorities Law (Stats..1938, Ch. 4; Deering's 1939 Supp., Act 3483) which authorizes the creation of public bodies corporate and politic to investigate housing conditions, to determine where slum areas exist and to construct or repair housing projects, and under the United States Housing Act of 1937, as amended (42 U.S.C.A., Ch. 8, Secs. 1401 to 1430) a housing project may be built in any location deemed desirable by those charged with their administration as the legislation was enacted to provide for low-cost housing incidental to slum clearance, but with no requirement that the new structure be confined to slum areas.

#### HOUSING - TAX EXEMPTION

(Jones v. City of Paducah, et al.; Court of Appeals of Kentucky, June 28, 1940.)

A city does not necessarily bind itself to expend monies . . . when it grants tax exemptions to Housing Authorities under contract with Housing Authorities to contribute either cash or tax remissions or tax exemptions to it.

It appears that an ordinance was passed by the City of Paducah agreeing to a form of cooperation between the City and the City of Paducah Municipal Housing Commission, the preamble of which states,

"Whereas, the United States Housing Act of 1937, as amended, provides that no part of such annual contribution by the USHA shall be made available for any project unless and until the state, city, county, or other political subdivision in which such project is situated, shall contribute in the form of cash or tax remissions, general or special, or tax exemptions, at least twenty per centum (20%) of such annual contributions."

In the contract the city agreed it would not levy, impose or charge any taxes of any kind against the projects or for or with respect to them "during the period of physical usefulness and in no event less than the number of years during which any of the obligations issued to assist the development of the projects shall remain outstanding."

The court affirmed the judgment of the circuit court which dismissed the petition and held that the city only made a definite and absolute commitment to exempt the property from taxation and as it does not bind the city to expend any money--which the appellant sought to enjoin--this question is taken out of the case.



LAND CONTRACT - REDEMPTION PERIOD

(Teetzel v. Atkinson, \_\_\_\_ Mich. \_\_\_\_, 291 N.W. 18.)

In Michigan there is no statute conferring the right to redeem in the foreclosure of land contracts. No such right exists independently of statute. What constitutes a reasonable time for redemption is governed by the facts and circumstances in a particular case and unless the period of redemption is so inequitable as to indicate a clear abuse of discretion it will not be disturbed.

The plaintiffs filed a bill to foreclose a land contract. They had sold land to the defendant who had defaulted in the payments. After foreclosure by plaintiffs the court gave the defendant the right to possession and use and income of the property for six months after confirmation of the sale with the right to redeem.

The question is whether a foreclosure and right of redemption of a land contract is the same as that of a mortgage foreclosure. The opinion of the lower court stated that:

"The only essential difference between this proceeding and a mortgage foreclosure is that here the court fixes the period of redemption. No good reason appears why this should be less than the statutory period of six months on mortgage foreclosures . . . .

"A decree of foreclosure may be entered. Vendee should pay the amount due within thirty days from the entry of the decree or vendors may proceed to sale as in mortgage foreclosures. The period of redemption is fixed at six months from the date of the confirmation of the sale as in mortgage foreclosures."

The Michigan Supreme Court, by a divided court, in upholding this decision and finding that there was no abuse of discretion of the trial court in granting a six months' redemption period in the foreclosure of a land contract in the absence of any statute stated:

"In a foreclosure proceeding in equity of a defaulted land contract the court has inherent power to grant a reasonable time for redemption. What constitutes a reasonable time for redemption of necessity is governed by the facts and circumstances attending the particular case. On appeal the trial court's decretal provision fixing a period for redemption should not be disturbed except the provision is so inequitable as to constitute a clear abuse of discretion. The controlling question on this appeal by the vendors is whether the provision in the foreclosure decree that the vendee might redeem within six months after confirmation of the foreclosure sale constitutes a clear abuse of the discretion vested in the trial court.

"The undisputed facts are that defendant purchased from plaintiffs for \$15,000 a residence subsequently occupied by defendant and her husband as a homestead, though later on it was rented. There was a down payment of \$3000. Subsequent monthly payments of \$120 were made to May 2, 1938, totaling \$2040. It thus appears defendant has paid on her \$15,000 contract \$5040. From the date of the contract sale (November 27, 1936) to the expiration of the time of redemption fixed in the decree a period of three years and one month intervened. The amount paid by defendant to plaintiffs during this period was the equivalent of a rental of approximately \$136.20 per month. In 1938 defendant rented this property for \$90 a month. It is a matter of common knowledge that gross rentals of this type of property rarely exceed 10% per annum. In the instant case certainly it may be fairly inferred the reasonable rental value of this property would not exceed \$125 per month. Even at that rate defendant paid an amount substantially in excess of the total rental value during the whole period of her occupancy, notwithstanding under the decree she was given six months after confirmation of sale within which to redeem. During that period appellee's contract payments exceeded the fair rental value of the property by more than \$400. We think the decretal provision for redemption cannot be said to constitute a clear abuse of discretion on the part of the trial judge."

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NOTE: This case was reported in 70 Housing Legal Digest 10 as having been overruled by a divided court. However, the case was affirmed by a divided court and the case is correctly reported herein.

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#### MECHANICS' LIENS

(J. W. Clampett, d/b/a/ Clampett Paint Store v. HOLC, Circuit Court, Graves County, Kentucky.)

One who furnishes materials to contractor without knowledge of the owner is not entitled to lien on property unless within 35 days after furnishing of last materials he notifies the owner in writing of his intention to claim a lien as required by Kentucky Statutes, Section 2463.

In a suit by Clampett to fix and enforce a mechanic's or furnisher's lien on property of HOLC, it appeared that HOLC had let a contract to Stephens to repair and recondition a property owned by it in Graves County, Kentucky; that Stephens without the knowledge of HOLC purchased materials from Clampett and used them in the performance of the contract; that after the completion of the contract, Stephens



represented to HOLC that all materials had been paid for and on this representation received payment in full from HOLC; that Stephens failed to pay Clampett for the materials furnished by him and used in the work, and that within six months after the furnishing of the last materials used in the work Clampett filed a statement in the office of the Clerk of the Graves County Court showing the amount due him, with all just credits and set-offs known to him, together with a description of the property sought to be charged with the furnisher's lien, which statement was recorded in the Encumbrance Book of the County. At the trial the court held that because Clampett had failed within 35 days after the furnishing of the last materials to notify HOLC in writing of his intention to hold the property liable or claim a lien, as required by Section 2463 of the Kentucky Statutes, he was not entitled to enforce a lien on the property. This was in full accordance with the principles underlying *Henry Koehler & Co. v. Anderson*, 217 Ky. 368; *Clinton Mfg. & Packing Co. v. Fullerton*, 167 Ky. 573, 181 S.W. 172; *Powers v. Brewer*, 238 Ky. 579; *Theatre Realty Co. v. P. H. Meyer Co.*, 243 Ky. 346; *Mingo Lumber & Lumber Co. v. Stanley*, 257 Ky. 687, and other Kentucky cases.

#### MORTGAGES - REFORMATION

(HOLC v. Lucille Mastalli Tognoli, et al. In Chancery of New Jersey. Decided June 5, 1940.)

For a subsequent purchaser to defeat the right of a mortgagee to reform the mortgage, he must not only have purchased in good faith and without notice of the prior equity, but his purchase must have been founded upon an original or presently moving consideration of value.

Suit by HOLC to reform and foreclose a mortgage as reformed.

In 1934, Renzo Mastalli applied to HOLC for a loan on his realty consisting of a plot 175 feet by 115 feet. The property consisted of one compact unit, part of which was covered by a stone house with a separate stone garage and a stone retaining wall. The house itself was on only two of the six lots making up the plot, but the garage and a driveway necessary to the proper use of the house, together with a cesspool connected with and belonging to the house, were on the other four lots. The evidence made it clear that it was the intention of both Mastalli and HOLC that the mortgage was to cover and include all six of the lots. However, by mistake and inadvertence the mortgage was so drawn and executed that it covered only two of the lots, and the mistake was not discovered until May 1938, after HOLC had decided to foreclose because of default in payments under its mortgage.

When HOLC decided to foreclose, it turned the matter over to an attorney, Mrs. Allard, who on May 6, 1938, called upon Mrs. Provida Mastalli, the widow of Rengo Mastalli then deceased, to discuss with her the possible execution of a deed in lieu of foreclosure. Upon viewing the premises and comparing them with the description in the mortgage, it became evident to the attorney that a mistake had been made in the description in the mortgage. Mrs. Mastalli was very ill at the time and after an explanation of the situation to her, the attorney left with the statement that she would return later. In August 1938, the attorney went again to the premises and was informed that since her first trip Mrs. Mastalli had conveyed the four lots not included in the description of the mortgage to Mr. A. Arnold Tognoli, and at the same time had made her will leaving everything to her daughter. Mrs. Mastalli, in September 1938, was taken to Greystone Park where she died in January 1939. Shortly after the death of Mrs. Mastalli, her daughter married Mr. A. Arnold Tognoli. HOLC then instituted this suit against Mr. Tognoli and his wife to reform the mortgage and to foreclose it as reformed. The court said:

"This defendant (Tognoli) claims title to the four lots by the deed made in July 1938 for the consideration asserted by him of prior loans made to Mrs. Mastalli. There is no corroboration either by records or other witnesses of these loans. Even if his assertions be accepted as true, this would not avail as against the equities of complainant. It was shown that Tognoli was a frequent visitor at the premises and by reason of his courting of the daughter and intimacy with the family, it is a reasonable conclusion that he knew about the mistake in the mortgage and took advantage of the situation in an attempt to save the four lots from the foreclosure. The execution of the deed to him soon after the disclosure of the mistake and the threat of foreclosure tends strongly to corroborate this conclusion.

"It is clear from the evidence that there was a mistake in the mortgage and complainant is entitled to a reformation and a foreclosure thereunder, except as against an innocent purchaser for value without notice. This, defendant, Tognoli, was not.

"In *Bajek v. Polack*, 120 N.J.Eq. 104, at p. 108, the court states: 'The rule is now well settled that the subsequent legal title to land, in order to prevail over a prior equitable title, must not only have been acquired in good faith and without notice of the prior equity, but must also be founded upon an original or presently moving consideration of value.' [Citing numerous prior cases.]



The court further states that a person taking a deed to secure payment of a pre-existing indebtedness is not an innocent purchaser for a valuable consideration nor can he be accorded the rights of such a purchaser against a superior equity. Also citing numerous authorities.

"A decree will be advised for reformation and foreclosure in accordance with the prayer of the Bill."

REAL ESTATE BROKERS - COMMISSIONS

(James A. Manniello et al v. HOLC; New York Supreme Court, Appellate Term, Second Department. Decided June 22, 1940.)

A real estate broker who procures an offer of purchase of realty which is not accepted by the owner and whose offerer refuses to accept a counter-offer of owner has not procured a customer ready, able and willing to purchase and is not entitled to commission where original offer was less than the owner's selling price.

A real estate broker sued HOLC to recover a commission of \$228 for procuring a purchaser of one of its properties. The trial court awarded him a recovery and HOLC appealed to the Appellate Term-Second Department of the Supreme Court of New York. The evidence introduced at the trial disclosed that through the efforts of the plaintiff as broker an offer of \$4000 was obtained for the purchase of the property for which HOLC had fixed a selling price of \$6000; that plaintiff had agreed in writing to be entitled to a commission "only, if, and when title passes"; that no duly authorized officer of HOLC had accepted the offer and executed the proposed contract of sale; that HOLC was willing to sell and convey the premises for \$4000 provided the purchaser would assume payment of a lien indebtedness of \$300 on the property; that the purchaser was unwilling to assume the payment of the \$300 lien indebtedness, and therefore that the sale was never consummated.

The Appellate Term apparently found it unnecessary to pass upon the contention of HOLC based on *Anies et al v. Wesnofske et al*, 255 N.Y. 166 that the use of the words "only, if, and when title passes" do not merely fix the time for the payment of the commission, in which event the broker might be entitled to the commission even though title never passed, but mean that the passing of title is a condition precedent to the broker becoming entitled to a commission at all. It reversed the judgment of the trial court against HOLC because it found that the evidence showed merely that HOLC was holding the property at \$6000; that plaintiff produced an offer of purchase at \$4000; that HOLC did not accept this offer but offered to sell at \$4000 provided the purchaser

would assume the payment of the \$300 lien against the property, and that this counter-offer of HOLC was not accepted by the offerer whom plaintiff had produced. Under this evidence the Appellate term held that plaintiff had not produced a customer ready, able and willing to purchase and was therefore not entitled to a commission.

TAXATION - MUNICIPAL CORPORATIONS - ASSESSMENTS

(Green v. Town of Montclair, \_\_\_\_ N.J. \_\_\_\_, 13 Atl. 2d 570.)

An assessment on real estate for an improvement cannot constitutionally become a lien thereon until the property receives a benefit from the improvement.

The controversy here related to the validity and the effect as a lien on lands of prosecutrix, of two assessments, one made in 1928 and the other in 1930. The 1930 assessment was for the construction of a sewer on the street fronting property on which the prosecutrix held a mortgage, and of which in 1936 she became owner by deed from the mortgagor. The 1928 assessment was for the cost of sewer connections between that property and the sewer. The outstanding facts in the case are that the sewer was built to connect with a projected sewer in an adjoining municipality, which latter sewer was not then built, never has been built, and so far as appears may never be built. At the time prosecutrix took her deed the two assessments did not appear as liens against the premises and were not carried on the regular town assessment books and did not indicate that they were then due and payable. After prosecutrix became the owner of the property, she attempted to sell it and was confronted with the assessments of which she had never previously heard. The purchaser refused to take title until the matter was adjusted, so the prosecutrix placed in escrow a sum of money equal to the amount of the assessments. The town never took any proceeding to enforce collection and never charged any interest on the assessments. The court set aside the assessments and stated:

"It is elementary that an assessment for benefits cannot be enforced until the benefit has been conferred. And it seems clear that the assessments now before us are of the class formerly and perhaps still known as 'prospective assessments'. Such a class seems to have been recognized by this court in New Jersey R. R. Co. v. Elizabeth, 37 N.J.L. 330, 335, but the land was held not subject to lien until the benefit had been actually received. Kellogg v. Elizabeth, 40 N.J.L. 274, 277. In the charter of Bayonne there was express provision for a general sewerage scheme which could be completed in installments, and property affected assessed if and when the actual benefit was conferred; and in 1887 there was a general act to much the



same effect, both of which are discussed in *Central New Jersey Land & Imp. Co. v. Bayonne*, 56 N.J.L. 297, 28 A. 713. Still later, in 1895, there was a similar act. P. L. page 95. In the *Central New Jersey Land Company* case the act of 1887 was expressly held constitutional. The element of prospective benefits does not seem to have been embodied in the 'Home Rule' act of 1917; and as we read section 25 of that act (amended in P.L. 1921, p. 162, N.J.S.A. 40:56-52) the making of the assessment is deferred until the benefit has accrued. The precise point, however, is unimportant for present purposes. One thing is clear; that the so-called 'assessments' for the laying of the sewer in Alexander Avenue and for the connection thereof with the abutting property, if legal at all, as to which we need express no opinion, are not in any wise a present lien on such abutting property, and cannot in any event become such until a present benefit is conferred. Such is the uniform holding of the cases cited above, and of many others in this state.

"It is suggested that the prosecutrix is in laches, and the case of *United Owners' Realty Co. v. Lodi*, 99 N.J.L. 529, 125 A. 111, is cited in support of this claim. It is conceded that the rule of laches does not apply in a case of unconstitutionality. *Meredith v. Perth Amboy*, 63 N.J.L. 520, 44 A. 971; *Walsh v. Newark*, 78 N.J.L. 168, 73 A. 523; *Mitsch v. Riverside*, 86 N.J.L. 603, 92 A. 436. In the *Lodi* case, it is true, the court intimates that the assessment plan therein involved was constitutional; but does not disclose what the plan was, except that there were certain properties assessed 'which have no access to the sewer'. But it is quite conceivable that a property may be presently benefited by a sewer though without direct access; and hardly conceivable that the court intended to overrule a line of cases holding that an assessment without corresponding benefit is unconstitutional." . . . .

#### TAXATION - SUBROGATION - MISTAKE

(*HOLC v. Louis W. Joseph et al*; Appellate Court for the Second District of Illinois.)

Mortgagee who inadvertently failed to include tax advance in foreclosure judgment cannot after redemption maintain suit for subrogation to the tax lien even though the redemptioner and purchasers through him had full knowledge of the tax advance and inadvertent failure to include it in the foreclosure judgment.

In a foreclosure suit HOLC took a foreclosure judgment and decree of sale, but inadvertently failed to include in the judgment

an advance that it had made shortly prior to the judgment for the payment of the 1935 taxes on the property in the amount of \$159.31. A third party, Henrietta A. Zeis, bid in the property at the foreclosure sale and thereafter the mortgagor, Louis W. Joseph redeemed the property from the foreclosure sale, but refused to reimburse HOLC for the tax advance. At the time of the purchase and at the time of the redemption both Zeis and Joseph had knowledge that HOLC had advanced and paid the 1935 taxes and had inadvertently failed to include the amount thereof in the foreclosure judgment. Joseph sold and conveyed the property to Shocker and wife at a profit. Shocker and wife also knew that HOLC had advanced and paid the 1935 taxes and had inadvertently failed to include the amount thereof in the foreclosure judgment. Shocker and wife mortgaged the property to the Rock Island Bank & Trust Co. which also had knowledge of the fact that HOLC had advanced and paid the 1935 taxes and had inadvertently failed to include the amount thereof in the foreclosure judgment. The redemption, the sale to Shocker and Wife and the execution of the mortgage to the Rock Island Bank & Trust Company all took place on the same day.

A short time later, HOLC instituted suit against Joseph and wife, Shocker and wife and the Rock Island Bank & Trust Company seeking subrogation to the lien of the 1935 taxes which it had advanced and paid and inadvertently failed to include in the foreclosure judgment. HOLC had previously filed in the foreclosure suit a motion to vacate the redemption, but this had been denied.

The Appellate Court for the Second District of Illinois held that even though the failure of HOLC to include the amount of the tax advance or payment in the foreclosure judgment had been a pure inadvertence, and even though all of the defendants had full knowledge of the facts and that HOLC would seek reimbursement or subrogation, it could not maintain the suit. It is believed that the decision is wrong and HOLC is seeking a review by the Supreme Court of Illinois.

#### TORTS - BANK LIABILITY

(Mass. Sup. Jud. Ct.; Schleifer v. Worcester North Savings Institution, June 7, 1940; 9 L.W. 2024.)

Bank holding mortgage may be liable in deceit for damages caused lessee taking lease on mortgaged premises in reliance on false statements of bank's president representing that directors had voted to extend and to increase mortgage.

It was claimed in the opening statement that the evidence would show the bank authorized the president to act, that while so



acting he made, as of his own knowledge, false representations of material facts, concerning an extension of the mortgage for ten years and an increase in its amount sufficient to cover taxes and interest in arrears, as well as false representations of fact as to the bank's intention to refrain from foreclosure, intending action to be taken thereon, and that the damage claimed was suffered in justifiable reliance.

All the elements of a cause of action for deceit being present, it was error for the trial court to direct a verdict for the bank upon the opening statement.

The bank's contention that its president had no authority to grant or extend loans, based on a statutory requirement of written applications for loans to be approved by the board of investment, overlooks the practical aspects of the situation and must be considered unsound. Although there are cases holding that the Statute of Frauds is available as a defense to a bank sued for deceit, this is not the view taken in Massachusetts and some of the other states (Restatement: Torts, sec. 530.)

"It would seem that someone in a savings bank might have authority to inform interested persons as to the granting and extension of loans and to discuss such matters with them. We cannot set up a rule of law that such authority may not be delegated to the president or habitually exercised by him with the consent of the bank. . . . Nor can we say as a matter of law that the plaintiff was not justified in relying upon the president's statements. He could reasonably believe that the statutory requirements had been complied with. . . . Restatement: Torts, secs. 537, 540."

#### TORTS - LANDLORD AND TENANT

(Marie Raymond v. Paul D. Reece, Receiver; Court of Common Pleas, Cuyahoga County, Ohio. Decided in June 1940.)

Landlord not liable to tenant for personal injuries caused by collapse of decayed wooden step even though used in common by tenants of both apartments where step appeared to be sound and landlord had no notice or knowledge of defective condition and was guilty of no negligence in not discovering defective condition.

In an HOLC foreclosure suit Reece was appointed and served as receiver. With the permission of the court, Marie Raymond, a tenant in the property, sued the receiver, Reece, for \$10,000 as damages for

personal injuries resulting from the giving way of one of three wooden steps in the rear of the property. The property was a two-family dwelling and the tenants of both apartments in the dwelling used the steps in common. At the conclusion of the plaintiff's evidence the court directed a verdict in favor of the receiver. In directing the verdict the court, among other things, said:

"Now then the court believes this is the rule of law that applies here: Had there been evidence that the Receiver knew of this condition, either notice by the tenant, notice gained through his own observation, or through a stranger, or the other tenants, and failed to make repairs,--on that testimony, if that appeared to be the situation, there would be no question about his liability.

"Now then I think that Mr. Raymond testified that from the outside appearance, before the step gave way, the only thing that he saw were these two cracks. After the step gave way, he said the wood appeared to be rotten. It appeared as if it had been picked out by the nail, or something of the kind.

"Well, you have a condition there that was not apparent to the tenants, themselves. On the contrary, they testified that it was not apparent. I take it, what was not apparent by inspection of the tenants, would not have been apparent to the Receiver.

"On the theory that if he had had notice about this, and failed to make repairs to the common passageway, the liability would attach. But it being a defect that he did not know about, no one else knew about it until the step gave way, liability does not attach. And I think that he was required to have notice, in a situation where the defect in the step could not, in the exercise of ordinary care, be observed.

"Counsel for the defense went out of the record, slightly, in indicating that the defendant, the Receiver, weighed over two hundred pounds. There was not any objection taken. He did use the steps, however, and I think casual observation would incline anyone to believe that he is much heavier than the plaintiff, herself.

"The court does not find that there was any negligence established here, on any possible theory. In the circumstances, the court will say that if the Receiver had known about it, assuming or presuming that he impliedly reserved control of the common steps, or steps used in common by both tenants, and failed to make repairs, he would be liable."



UNITED STATES - ASSIGNMENTS - PRIORITIES

(In re Long Island Sash & Door Corporation; Supreme Court, Appellate Division, Second Department, 20 N.Y.S. 2d 573.)

The United States is entitled to priority in payment of claims, where the debts were assigned to it prior to insolvency of debtor. The priority results merely from the insolvency of debtor and the ownership of the claim by the United States.

This was an appeal by the United States from an order insofar as it denied priority on its Federal Housing Administration claims and allowed the City of New York priority over it on its sales and business tax claims. The court held that the United States was entitled to priority of payment in this case where the debts were assigned to it prior to the insolvency, and stated:

"In our opinion Federal Housing Administration claims are entitled to priority of payment under section 3466 of the Revised Statutes (U.S.C., Title 31, sec. 191, 31 U.S.C.A. sec. 191) where, as in the instant case, the debts were assigned to the United States prior to the insolvency. See *Wagner v. McDonald*, 8 Cir., 96 F. 2d 273; *In re Wilson*, D.C., 23 F. Supp. 236; *In re T. N. Wilson, Inc.*, D. C., 24 F. Supp. 651. In *Korman, as trustee in bankruptcy, etc. v. Federal Housing Administrator*, \_\_\_\_ F. 2d \_\_\_\_ (decided June 3, 1940) the United States Court of Appeals for the District of Columbia held that a claim owned by the Federal Housing Administration at the time a petition in bankruptcy was filed is a "debt due to the United States" within the meaning of the statute. In any event, the United States of America is entitled to priority upon these claims in view of the fact that the assignments of the claims and the notes given as security were made to the United States and were in its name at the time the borrower made the general assignment for the benefit of creditors. Under section 3466, the priority of payment does not depend upon how the United States acquired title to the notes, nor upon their status prior to the transfer. Priority results merely from the insolvency of the debtor and the ownership of the claim by the United States. *Wagner v. McDonald*, supra, *Howe v. Sheppard*, 12 Fed. Cas. 672, No. 6772, 2 Sumn. 133; *Lewis Trustee v. United States*, 92 U.S. 618, 23 L. ed. 513; *United States v. Fisher*, 6 U.S. 353, 2 Cranch 358, 2 L. ed. 304."

UNITED STATES - BANKS AND BANKING - TAXATION

(Roberts v. FLB of New Orleans, \_\_\_\_\_ Miss. \_\_\_\_\_; 196 So. 763.)  
A Privilege Tax on automobiles is a "tax" as distinguished from a "toll" and is not an exercise of the "police power" of the state, as distinguished from the "taxing power", and the FLB of New Orleans, as an instrumentality of the United States Government, is exempt from payment of state privilege taxes on motor vehicles operated by the bank within the state for purpose of carrying on its business.

The appellate, Roberts, Sheriff of Hinds County, Mississippi, demanded of the FLB of New Orleans privilege taxes, pursuant to Chapter 148, Laws of 1938, upon certain motor vehicles operated in the state by the bank for its official use. The FLB paid the taxes under protest, and this suit was brought to recover the money so paid.

The County Court sustained the contention of the sheriff and an appeal was taken to the Circuit Court of the First District of Hinds County, Mississippi, where the judgment of the County Court was reversed and the court rendered judgment for the bank, awaiting recovery of the money so paid to the sheriff. An appeal was then taken. Many questions were presented on the appeal but the one that is to be considered is whether the FLB comes within the purview and meaning of the said Chapter 148 of the laws of 1938, in which the term "person" is defined; and section 7 of which contains this provision: "There shall also be one class of tags designated as 'tax free tags' for use on motor vehicles belonging to the state of Mississippi, or any of its subdivisions, and to the United States or any of its subdivisions. Tax free tags shall, in addition to 'Miss.', and the year for which issued, bear the word 'tax free'. When any motor vehicle for which a 'tax free' tag has been issued, is sold or traded, and becomes the property of some person who would be liable to pay the privilege thereon, report of such sale shall be made immediately to the commissioner, by the proper person, and the tag shall be delivered to the commissioner."

Under the laws of Mississippi the privilege tax on automobiles is described as being for the use of the roads. Nevertheless, it is a tax as distinguished from a toll. The court said in this regard that: "In other words, it /privilege tax/ is not a charge for the use of a particular highway at a particular time, but is for the use of any and all highways of the State during a prescribed period of time, without regard to the use. It is also true that the tax so collected is not used in the construction and repair of highways maintained by the United States and the State of Mississippi jointly, but the fund is used for county roads which are not under the jurisdiction of the State Highway Commission, and which the United States Government does not aid in the



construction. The privilege tax is therefore a tax and not a toll; and it is not an exercise of the police power of the State in the legal sense of the term 'police power', as distinguished from the term 'taxing power'."

The FLBs are agencies and instrumentalities of the United States, and it has now been settled by the United States Supreme Court that agencies of the United States Government can perform only governmental and not proprietary functions, and that all of its acts are necessarily governmental, and therefore public. It was held in *Pittman v. HOLC*, 308 U.S. 21, 60 S.Ct. 15, that Congress has constitutional authority to provide that a corporation created by it (such as the HOLC, including loans made and mortgages held by such corporation) shall be exempt from state and municipal taxation. The court went on further to say that:

"It was also held that the activities of a corporation, through which the National Government lawfully acts, must be regarded as a governmental function, and such corporation or agency is entitled to immunity as if the functions were performed by the government itself, through its departments. It was still further held that the Congress has the power not only to create a corporation for the performance of governmental functions, but also to protect the operations thus validly authorized; and, in the exercise of this power to protect the lawful activities of its agencies, Congress has that dominant authority which necessarily inheres in its action within the national field. In this case, the court adhered to its former decision in *FLB v. Crosland*, 261 U.S. 374, 43 S.Ct. 385, 67 L.ed. 703, 29 A.L.R. 1.

"It thus appears from the most recent decisions of the United States Supreme Court, to which our attention has been called, that the Congress not only has the power to create a corporation to further the exercise of its governmental power, but when it is so created by the Congress, such corporation becomes an instrumentality of the government and all of its actions or functions are governmental, although they may have characteristics of private corporations and engage in a business which would ordinarily be of a private nature. It further has the full and plenary power above state laws and regulations to protect agencies from taxation or control. In the case of *Pittman v. HOLC*, supra, it was undertaken to distinguish that case from a prior case, *Federal Land Bank v. Crosland*, supra, but the court held that there was no substantial distinction and that it was not within the legislative authority to require the HOLC to pay a mortgage tax, where such payment was necessary, if valid, to protect the mortgage from subsequent purchasers or encumbrances without notice . . . .

"The Congress having the power to protect an agency created by it, which has been held to be constitutional in prior decisions, had the power to and did exempt the Federal Land Bank from taxation by the several states. 12 U.S.C.A. § 931. The substance of which is quoted above. From these decisions, by the court whose authority is final in such matters, we are forced to the conclusion that the court below was correct in rendering for plaintiff Land Bank a judgment for its demand recovering the taxes paid under protest; and the judgment of the court below is affirmed."

#### WORKMEN'S COMPENSATION ACT

(Joe Molis v. HOLC and Harry U. Berkson & Sons, Inc., No. 270292, Industrial Commission of Illinois. Decided June 13, 1940.)

Salaried employees of contract management broker of HOLC injured while working on property of HOLC in charge of contract management broker, is entitled to recover compensation from HOLC under Workmen's Compensation Act of Illinois.

Joe Molis filed an application before the Industrial Commission of Illinois against HOLC and Harry U. Berkson & Sons, Inc. seeking compensation and medical expense under the Workmen's Compensation Act of Illinois because of a personal injury sustained by him on September 13, 1939. Harry U. Berkson & Sons, Inc. was a contract management broker of HOLC and as such had charge of the rental and maintenance of some of its properties. Molis was in the regular employ of the contract management broker and received a salary from said broker for acting as janitor of a number of properties under the control of the broker. At the time of the accident resulting in the claim sued upon Molis was washing a window in a house owned by HOLC but in charge of the contract management broker. HOLC pleaded before the Industrial Commission of Illinois that Molis was not in its employ but that if he were he could not recover from it under the Workmen's Compensation Act of Illinois but only under the Federal Employees' Compensation Act, HOLC being an instrumentality of the United States to whose employees the Federal Employees' Compensation Act is applicable--not the Illinois Workmen's Compensation Act.

An Arbitrator of the Industrial Commission of Illinois to whom the case was assigned rendered and filed a finding in favor of Molis and against HOLC for compensation and medical expense, the sole basis of the finding being as follows:



"That the petitioner (Molis) and the respondent Home Owners' Loan Corporation were on the 13th day of September, 1939, operating under the provisions of the Workmen's Compensation Act; that on the date last above mentioned said petitioner sustained accidental injuries which did arise out of and in the course of the employment . . . Harry U. Berkson & Sons, Inc., a corporation is hereby dismissed as a party respondent in this cause."

From this finding of the Arbitrator, HOLC has filed a petition for a review by the full commission.

#### ZONING - TOURIST HOMES

(Ewing v. Braun et al; Court of Appeals of Louisiana, 196 So. 571.)

The so-called "tourist home" is a matter of recent origin and while in some aspects it may differ from rooming or lodging houses of earlier years, yet in other cases it is different in name only, and does not change the character of the place.

The plaintiff sought by an injunction to restrain defendants from operating a "tourist home" on the ground that the operation of such a business in the locality where the house is located is violative of the zoning ordinance of the city of New Orleans. The zoning ordinance of New Orleans divides the city into twelve districts and defendants' home is situated in the "A" district where the conduct of a tourist home, boarding house or rooming house is not permitted.

The defendants admitted that it is being used as a "tourist home" in that "transients are lodged therein without previous arrangement and for compensation" but they denied that they were violating any provision of the zoning ordinance because the building has always been used, since its erection in 1927, two years before the adoption of the ordinance, for the same purpose and that its continued use is permitted under a section of the zoning ordinance.

The question presented here is whether the defendants were, prior to the adoption of the present zoning ordinance, conducting the same business as they have since, so as to be exempt from the restriction contained in the ordinance. It is admitted that defendants had taken in "roomers" and that a sign with the word "rooms" on it was placed on the outside of the house so as to be noticed by people passing by. However, no permanent boarders were kept and people merely stopped in for a night or two, or a short length of time.

The court, in finding that the business which was being conducted at the present time and after the present zoning ordinance went into effect, was the same as that previously done, and that there was no distinction in this case between the former "rooming house" and the present "tourist home" stated:

"The argument evidently is that since the defendants are shown by the record to have accommodations for not more than five people, they did not come within the definition of either a lodging or boarding house and that, therefore, by inference, the defendants are conducting no business at all and are simply occupying their property as a dwelling house as they are permitted to do in the most restricted area--that described in the ordinance as the 'A' residence district. Whatever may be the force of this argument and whether the defendants were engaged in business or not prior to the adoption of the ordinance, the question still remains was the use of their property, subsequent to the enactment of the ordinance, the same as it was before the enactment, for they have not enlarged the premises and accommodate no more tourists now than they did roomers prior to 1929. They now call their establishment, however, a 'Tourist Home' and have a sign to that effect, whereas previously they accommodated only roomers, but neither the roomer nor the tourist made any previous arrangements for the use of the defendants' accommodations and the only distinction that we can draw is one without a difference so far as we can see--that between a roomer and a tourist. It is a well known fact, reflected by some of the evidence in the record, and of common knowledge, that the so-called 'tourist home' is a matter of recent origin and development, and while in some sinister aspects, the tourist home may be said to present marked differences from the rooming or lodging house of earlier years, nevertheless, insofar as the defendants in this case are concerned, none of the objectionable features are claimed to be present, consequently, the only difference, which we can see, is in the name given the place and the wording of the sign which advertises it."



ADMINISTRATIVE ORDERS, REGULATIONS, and OPINIONS

TAXATION - INTERNAL REVENUE - EXCESS PROFITS TAX

(Hollywood Building and Loan Ass'n., 42 B.T.A.--No. 36, Docket No. 93878, (Hill), June 26, 1940, 9 L.W. 2018.)

Building and loan associations which released first mortgage debts in return for HOLC bonds and notes secured by second mortgages in amount representing difference between original debts and HOLC bonds, may not charge off second mortgage debts as worthless in absence of showing that debtors are unable to pay or that possible defense to action on notes has been raised.

There is no merit in the contention that the second mortgage debts are worthless on the theory that under California law they are not valid obligations. The second mortgages were executed with the knowledge and consent of the HOLC. Such second mortgages have been held invalid as against public policy only when executed without knowledge of the HOLC.

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Other rules, regulations, and administrative orders affecting housing construction or finance agencies are as follows:

GOVERNMENT EMPLOYEES: The President: By executive order, filed June 4, prescribed rules and regulations for the administration of the Interbuilding Mail and Messenger Service which was consolidated in the Post Office Department by Reorganization Plan No. IV. See 5 Fed. Reg. 2131.

The President, by order filed July 2, directed the U. S. Civil Service Commission to establish a Council of Personnel Administration and designated the functions of such Council. See 5 Fed. Reg. 2468.

The President, by order filed June 28, directed the Civil Service Commission to establish a replacement list for certain employees who were involuntarily separated from the Federal Service

to be used for the purpose of making temporary appointments to national defense positions. See 5 Fed. Reg. 2435.

Civil Service Commission: Published a notice of the condition of the apportionment as of the close of business on May 31, 1940. See 5 Fed. Reg. 2136.

Published a notice of the condition of the apportionment as of the close of business on June 15, 1940. See 5 Fed. Reg. 2313.

Published a notice of the condition of the apportionment as of the close of business on June 29, 1940. See 5 Fed. Reg. 2489.

Published a notice of the condition of the apportionment as of July 15, 1940. See 5 Fed. Reg. 2627.

Published a notice of the condition of the apportionment as of July 31, 1940. See 5 Fed. Reg. 2764-5.

FARM CREDIT ADMINISTRATION: The Governor, by regulations filed June 7, (1) authorized certain officers designated therein to approve the acts of receivers of joint stock land banks, and (2) authorized certain officers designated therein to empower joint stock land banks to hold title and possession of real estate for a period of longer than five years. See 5 Fed. Reg. 2157.

The Governor, by regulation filed June 3, amended the Code of Federal Regulations with regard to the interest rate on loans made by the regional agricultural credit corporations. See 5 Fed. Reg. 2109.

The Acting Governor, by regulation filed June 15, designated the authority and order of precedence of the Deputy Land Bank Commissioners. See 5 Fed. Reg. 2252-3.

The Acting Land Bank Commissioner, by regulation filed June 15, prescribed conditions for the partial retirement of national farm loan association stock upon the closing of an additional loan. See 5 Fed. Reg. 2253.

The Deputy Cooperative Bank Commissioner, by regulations filed July 11, amended the Code of Federal Regulations with respect to (1) the effect of non-producer ownership of voting media on a cooperative's eligibility for loans; and (2) the policy of retiring



non-producing ownership media in such cooperatives. See 5 Fed. Reg. 2542.

The Acting Land Bank Commissioner, by order filed July 19, changed the section number in the Code of Federal Regulations on Participation Certificates. See 5 Fed. Reg. 2619.

The FLB of Baltimore, by regulation filed June 27, amended the Code of Federal Regulations with reference to reamortization fees charged by the bank. See 5 Fed. Reg. 2397.

The FHLB of Berkeley, by regulations filed June 20, amended the Code of Federal Regulations with respect to (1) partial release fees; (2) Insurance fire loss fees; and (3) reamortization fees. See 5 Fed. Reg. 2315-16.

The FLB of Columbia, by regulation filed June 28, 1940, amended its schedule of application fees. See 5 Fed. Reg. 2423.

The FLB of Houston, by regulation filed June 14, amended its schedule of fees with regard to reamortization fees. See 5 Fed. Reg. 2239.

The FLB of New Orleans, by regulations filed June 10, amended its schedule of fees with respect to appraisal and title determination fees and reamortization fees. See 5 Fed. Reg. 2193.

By order filed July 19, amended the Code of Federal Regulations with regard to liquidation or prepayment fees. See 5 Fed. Reg. 2619.

The FLB of Spokane, by regulations filed June 26, amended the Code of Federal Regulations with reference to reamortization and long-term extension fees. See 5 Fed. Reg. 2389.

The FLB of Springfield amended the Code of Federal Regulations to provide that applicants for land bank and Commissioner loans be not required to pay a title determination fee. See 5 Fed. Reg. 2437.

By order filed July 18, amended the Code of Federal Regulations with regard to reamortization fees. See 5 Fed. Reg. 2607.

By regulations filed August 1, amended its schedule of appraisal fees and provided for the refunding of appraisal fees in cases where the application was canceled prior to appraisal. See 5 Fed. Reg. 2721.

FARM SECURITY ADMINISTRATION: The Secretary of Agriculture, by order filed July 5, designated the counties in Louisiana in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2495.

The Secretary of Agriculture, by orders filed July 1 and 2, designated the counties in Massachusetts and Kentucky in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2462.

The Secretary of Agriculture, by orders filed June 28, designated the counties in Alabama, Arkansas, Colorado, Delaware, Georgia, Indiana, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, Wisconsin, and Wyoming in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2447-2451.

The Secretary of Agriculture, by notice filed July 10, designated the counties in Texas in which loans may be made during the fiscal year under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2546.

The Acting Secretary, by notices filed July 6, designated the counties in Connecticut, Florida, Idaho, Oklahoma, Virginia, and Washington in which loans may be made during the fiscal year under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2513-14.

The Acting Secretary of Agriculture, by order filed July 25, prescribed rules and regulations for the determination of the value of the average farm unit of 30 acres and more in counties where loans for the purchase of farms may be made. See 5 Fed. Reg. 2668-9.

The Secretary of Agriculture, by order filed July 26, designated Webb County, Texas, as a county in which loans may be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2673-4.

The Acting Secretary of Agriculture, by order filed July 23, designated Otero County, Colorado, as an additional county in which loans may be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2649.

The Acting Secretary of Agriculture, by orders filed August 5, designated the counties in Hawaii and Utah in which loans could be



made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed.Reg. 2773-4.

The Administrator, by order filed August 7, authorized and prescribed the conditions for the sale of state rural rehabilitation surplus tracts and the improvements thereon. See 5 Fed. Reg. 2783.

The Acting Secretary of Agriculture, by orders filed August 7, designated the counties in Arizona and Kentucky in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 2783.

FEDERAL HOME LOAN BANK BOARD: Adopted a resolution, filed June 12, prescribing the form for annual reports by savings banks. See 5 Fed. Reg. 2212.

Adopted resolutions, filed July 17, (1) prescribing insurance requirements, and (2) providing the handling of legal expenses incidental to the closing of extensions advanced by the HOLC. See 5 Fed. Reg. 2610-2613.

Home Owners' Loan Corporation: The General Manager and General Counsel, by regulation filed June 20, prescribed procedures for renewal insurance by home owners and accruals on tax and insurance accounts of home owners. See 5 Fed. Reg. 2330.

The General Manager and General Counsel, by regulations filed June 17, amended (1) the procedure set out for purchase of property by a Corporation employee; and (2) the procedure for the application of miscellaneous credits. See 5 Fed. Reg. 2268.

The General Manager and General Counsel promulgated a procedure for the handling of garnishment processes against employees of the Corporation. See 5 Fed. Reg. 2428.

The General Manager and General Counsel, by orders filed July 17, (1) promulgated a procedure for the handling of advances to home owners for payment of taxes, assessments, levies, etc.; (2) prescribed insurance requirements; and (3) promulgated a procedure for obtaining sufficient insurance upon the expiration or cancellation of an outstanding policy. See 5 Fed. Reg. 2610-13.

The Assistant Secretary of the Corporation, by orders filed August 1: (1) amended the regulations with respect to Tax and Insurance Accounts; and (2) amended the regulations prescribing the amount of fire

insurance to be carried where the indebtedness is greater than the dwelling value but not the improvement value, and where the indebtedness is equal to or less than the dwelling value. See 5 Fed. Reg. 2740-2741.

The General Manager and General Counsel, by orders filed August 1, promulgated procedures for: (1) making extensions; (2) the establishment and handling of Tax and Insurance Accounts; (3) the validation of billing forms by collection offices; and (4) the placement of windstorm insurance. See 5 Fed. Reg. 2739-2742.

The General Manager and General Counsel, by order filed August 6, promulgated a procedure for the sale of non-expendable or expendable property of the Corporation. See 5 Fed. Reg. 2768-9.

RURAL ELECTRIFICATION ADMINISTRATION: The Administrator, by regulations filed June 1, (1) amended prior administrative orders with respect to allocations made and projects designated therein, and (2) allocated funds to certain designated projects in Alabama, Arizona, Arkansas, Illinois, Minnesota, Missouri, Nebraska, Ohio, Oregon, South Carolina and Virginia. See 5 Fed. Reg. 2122-3.

The Administrator, by an order filed June 11, amended previous administrative orders in specified particulars. See 5 Fed. Reg. 2197-8.

The Administrator, by orders filed June 8, (1) amended a previous administrative order with respect to a project designation contained therein, and (2) allocated funds for designated projects in New Mexico and Virginia. See 5 Fed. Reg. 2183.

The Administrator, by orders filed June 14, (1) allocated funds to a designated project in Illinois, and (2) amended a previous order in order to reduce the amount allocated therein. See 5 Fed. Reg. 2274.

The Administrator, by order filed June 21, allocated funds to a designated project in Virginia. See 5 Fed. Reg. 2373.

The Administrator, by orders filed May 27, (1) amended previous orders in which allocations of funds were made to designated projects, and (2) allocated funds to other designated projects in Texas and Michigan. See 5 Fed. Reg. 2087-8.

The Administrator, by order filed June 29, amended a previous administrative order with respect to the designation of the project named therein. See 5 Fed. Reg. 2452.



The Administrator, by orders filed July 10: (1) allocated funds for certain designated projects in Indiana, Iowa, Mississippi, Ohio, Pennsylvania, Texas, Arkansas, Georgia, Idaho, Kentucky, Minnesota, Missouri, Montana, Nebraska, North Carolina, Oregon, South Carolina, Tennessee, Washington, Alabama, Colorado, North Dakota, Maryland, Oklahoma, Pennsylvania, and Illinois, and rescinded a previous allocation of funds to a designated project in North Dakota. See 5 Fed. Reg. 2547.

The Administrator, by order filed July 18, allocated funds for designated projects in Arkansas, Colorado, Florida, Kansas, New Hampshire, North Carolina, Oklahoma, Oregon and Wisconsin. See 5 Fed. Reg. 2623.

The Administrator, by order filed July 25, allocated funds for certain designated projects in Georgia, Illinois, Indiana, Iowa, Missouri, Oklahoma, Oregon, Texas and Vermont. See 5 Fed. Reg. 2674.

The Administrator, by orders filed July 22, allocated funds for designated projects in Kansas, Maine, North Carolina, and Washington. See 5 Fed. Reg. 2649.

The Administrator, by orders filed August 5: (1) rescinded a prior administrative order; (2) amended other prior administrative orders in specified particulars; and (3) allocated funds for designated projects in Alabama, Arkansas, Colorado, Georgia, Idaho, Iowa, Illinois, Indiana, Kansas, Minnesota, Mississippi, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Washington. See 5 Fed. Reg. 2774.

The Administrator, by order filed August 9, allocated funds for designated projects in Colorado, Indiana, Iowa, Louisiana, Michigan, Minnesota, Oklahoma, Pennsylvania, Virginia, and Washington. See 5 Fed. Reg. 2808.

LEGAL COMMENT

THE NATIONAL DEFENSE ADVISORY COMMISSION issued a statement on the general functions of the new defense housing coordinator, Charles F. Palmer. These functions are:

"1. The Defense Housing Coordinator will be attached to the office of the Secretary and will exercise his authority under the general direction of the Commission.

"2. Generally speaking, he will be responsible for planning the defense housing program and for its prosecution through private industry and the appropriate federal agencies concerned with the planning, construction, and financing of housing. Thus it will be his responsibility to channelize and coordinate those activities of federal agencies that will be concerned with defense housing, to insure an effective and integrated program. Among other matters, the Defense Housing Coordinator will be expected to anticipate housing needs that may arise as a result of defense activities and to take whatever action may be necessary to avoid any housing shortages. He will determine, after survey, whether the construction of necessary additional housing facilities should be undertaken by private enterprise or by public agencies, and in appropriate cases, he will assist such public or private agencies in formulating the plans, terms, and other conditions and arrangements for such construction. He will, in addition, review plans for erection or expansion of plants or for the procurement of large stocks of materials in the light of housing needs which they may create.

"3. Any information that will enable him to forecast the exact housing needs and make necessary preparations to see that these needs are supplied should be made available to him.

"4. In those instances where the costs of housing construction or of remodelling to meet the needs of the defense program are to be borne in whole or in part by a federal agency (whether by subsidy or loan), the need for such housing and the standards of construction shall be certified by the Commissioner responsible for labor and employment and by the Commissioner responsible for consumer protection. Standards of construction shall include (1) those factors in construction which affect costs and thereby rents and (2) those factors which affect



liveability, including lay-out, spacing of dwellings, and availability of utilities and of community facilities.

"5. In working out the plans for construction, arrangements shall be made with the Commissioner on employment and labor toward insuring satisfactory terms of employment and the availability of an adequate supply of labor.

"6. He will, as part of his duties, review the legislation relating to or affecting defense housing activities with a view to determining the direction of the program within the limits of existing legislation and will recommend to the Commission such additional legislation as may be required to insure an adequate program."

VALIDITY OF SECOND MORTGAGES. by David A. Bridewell, John Marshall Law Quarterly, March 1940. Vol. 5, No. 3.

This article describes in detail the procedure of HOLC in refinancing mortgages. There is a summary of the HOLC Act with its amendments and a discussion of the rules and regulations of the corporation to facilitate the execution of the Act. The author points out the bases upon which litigation has arisen--to enforce or cancel the mortgage contract. The results of the litigation are summarized and appraised. The article is profusely annotated with cases, and extracts from the Manual of Rules of the Corporation.

HOLC: ITS LEGAL STATUS, PRIVILEGES and IMMUNITIES. by David A. Bridewell, John Marshall Law Quarterly, June 1940. Vol. 5, No. 4.

This article proposes to present some considerations of the test or legal formula from which to determine whether a Federal corporation is entitled to the privileges and immunities of an instrumentality of the Federal Government. The author discusses at length the cases in which the courts have expressed opinions upon the functions performed by various Federal corporations. Summarizing the points the rule is evolved that the intent of Congress is determinative even though some strained constructions may be given to the intent. The intent is gathered from a consideration of the function to be performed, extent of control by the Federal Government, the powers given in the Act, whether the corporation is created by Federal or State law, whether it is designated as an arm

of the Government, whether the employees are paid by the U.S. and its funds are controlled by the Budget and Accounting Act, and to be repaid to the Federal treasury upon liquidation. These generalizations are then applied to the HOLC with specific attention to cases involving suits by and against the HOLC. There is also a valuable discussion of some State laws which affect HOLC--immunity from taxation, statutes of limitations.

The author has presented a very interesting discussion of the trend of the decisions and very aptly concludes that many of the decisions relating to HOLC and other Federal corporations are now obsolete.

"FAIR VALUE" AND THE DEFICIENCY JUDGMENT. by John L. Tierney. Journal of Land and Public Utility Economics, May 1940. Vol. XVI, No. 2.

Since the depression deficiency judgments have been a source of considerable litigation but less legislation. The author here discusses the history of such judgments and recent legislative changes. The usual method of a court of equity in computing the amount of the deficiency judgment was to calculate the difference between the outstanding balance of the mortgage, plus costs and the foreclosure sale price. Recent trends in legislation require the "fair value" in place of the foreclosure sale price in the calculation. Numerous cases are discussed as are those construing this recent legislation.

One of the problems in this procedure is to determine the fair value. Reference is made to various cases and the interpretations contained in them and the impact of economic laws. The author considers the economic side of the picture in pointing out the absence of bidders at foreclosure sales and the reasons therefor, and the distinction between price and value.



LEGISLATION

FederalFEDERAL HOUSING ADMINISTRATION:

- H. R. 10280, S. 4198.- Mr. McDowell. Introduced August 1. To amend Section 203 of the National Housing Act to provide for payments of installments on mortgages under this Act by the Administrator to the mortgagees when the mortgagor volunteers or is drafted into the military or naval forces of the United States.
- S. 4181. Mr. Schwollenbach. Introduced July 1. To amend Par. (1) of Section 207 (a) of the National Housing Act to permit the construction of certain housing projects where not exceeding 40% of the gross estimated income from the building will be derived from the business portion thereof.

APPROPRIATIONS

- H. R. 10263 - Passed House July 31. To make supplemental appropriations for national defense. Amendments proposed in the Senate include an item of one hundred million dollars for construction of housing facilities. This item is proposed to be increased to three hundred million dollars by Senator Wagner.

SELECTED REFERENCES

(The following list of current references, while by no means exhaustive, indicates the availability of material concerning legal problems regarding housing, and related documents.)

CONTRACTS

- Frustration of Contract by War. Arnold D. McNair. 56 Law Quarterly Review, April 1940, p. 173-207.

HOUSING-Construction Costs-Georgia

Minimum construction requirements for new dwellings located in Georgia. Federal Housing Administration, Atlanta, Ga. Rev. May 15, 1940. 1940. (FHA Form 2317.) Federal Housing Administration FL2.11: G29/940.

-Indiana

Minimum construction requirements for new dwellings located in Indiana. Federal Housing Administration, Indianapolis, Ind. Rev. May 1, 1940. (FHA Form 2304.) Federal Housing Administration FL.11: In 2/940.

-Iowa

Minimum construction requirements for new dwellings located in Iowa. Federal Housing Administration, Des Moines, Iowa. Rev. May 15, 1940. (FHA Form 2328.) Federal Housing Administration FL2.11: Io9/940.

-Massachusetts

Minimum construction requirements for new dwellings located in Massachusetts. Federal Housing Administration, Boston, Mass. Rev. May 15, 1940. 1940. (FHA Form 2296.) Federal Housing Administration FL2.11: M 38/940.

-Minnesota

Minimum construction requirements for new dwellings located in Minnesota. Federal Housing Administration, Minneapolis, Minn. Rev. May 1, 1960. 1940. (FHA Form 2330.) Federal Housing Administration FL2.11: M66/940.



HOUSING-Construction Costs (contd.)-District of Columbia

Alley Dwelling Authority. District of Columbia alley dwelling act approved June 12, 1934, as amended by act of Congress approved June 25, 1938 (Public No. 307, 73d Congress, S. 1780), act to provide for discontinuance of use as dwellings of buildings situated in alleys in District of Columbia, and for replatting and development of squares containing inhabited alleys, in interest of public health, comfort, morals, safety, and welfare, and for other purposes. /1940/ 5 p. District of Columbia DC 57.2: A1 5/6.

-General

Housing and welfare, report of survey (with selected list of references; prepared by Jean Conan.) May 1940. v/53p. (Survey conducted in cooperation with Social Security Board, Federal Security Agency.) Federal Works Agency - Housing Authority FW3.2: H 81/7.

Property improvement loans under title 1 of national housing act, as amended June 3, 1939, regulations effective Jan. 1, 1940. (1940.) (FHE 1, rev. 3-15-40.) Federal Housing Administration FL2.6:L78/940.

-Insurance

Insurance on USHA-aided projects. Rev. March 26, 1940. /1940/ cover title iii/16 p. 4. (Bulletin 26 /on policy and procedure/). (Information on insurance coverages, reports and procedures. Substituted for Bulletin 26 dated Nov. 15, 1939. and addendum 1 thereto.) Federal Works Agency - Housing Authority - FW3.9:26/2.

-Low-Rent

Low-rent housing. Steps in development of low-rent housing project, subsequent to execution of contracts for loan and annual contributions. /Revised/ Mar. 21, 1940. /1940/ cover title, iii/17 p. 4. (Bulletin 15 /on policy and procedure/) (Steps in project development through award of construction contracts.) Paper, 15¢. Federal Works Agency - Housing Authority FW 3.9:15

-Miscellaneous

Federal Housing Administration Clip Sheet v. 23, no. 2 and 3; May 7 and 21, 1940. /1940/ Each 1 p. 1l. (Biweekly) Federal Housing Administration FL2.7:23/2,3.

-Public

Public housing, weekly news from American communities abolishing slums and building low-rent housing, v. 1, no. 39-42; May 7-28, 1940. /1940/ Each 4p. 1l. (Issued with perforations.) Paper, 5¢., single copy, \$1.00 a year.; foreign subscription, \$1.80. FWA - Housing Authority FW3.7:1/39-42

LAW-Copyright

The extent of copyright protection for law books. Paul P. Lipton, Student Univ. of Wisconsin, Second Copyright Law Symposium.

-Miscellaneous

Digest of public general bills with index, 76th Congress, 2d and 3d sessions, no. 13; bills introduced Sept. 21, 1939-Apr. 30, 1940. 1940. iii+159 p. large 8<sup>o</sup> (Supplement to No. 9). Paper, 20¢. Legislative Reference Service LC 14.6/76/13

Law Library of Congress, account of its activities and the more important accessions, fiscal year 1939; by John T. Vance. (1940). cover title, 56 p. (From Report of Librarian of Congress, 1939). Law Library LC10.1:939.

Source of information on legislation, 1939, bibliographical list of published material received in Library of Congress prior to Jan. 1, 1940; (Compiled by Jacob Lyons.) 1940. /2/+36p. (Special report 3.) Paper, 10¢. Legislative Reference Service. LC 14.7:3.

MISCELLANEOUS

-Federal Loan Agency News, v. 1, no. 10-12; Apr. 30-May 28, 1940. /1940/ Federal Loan Agency FL1.8:1/10-12

Federal Home Loan Bank Review, v. 6, no. 8; May 1940. /1940/ cover title, p. 249-288. Paper, 10¢ single copy, \$1.00 a yr.; foreign subscription \$1.00. Federal Home Loan Bank Board FL 3.7:6/8.

Government Publications and their use. Second Edition. by Lawrence F. Schneckebier. The Brookings Institution, Washington. 1939. \$3.00.

Manual on the use of state publications. Edited by Jerome K. Wilcox. Chicago, American Library Association. 1940. \$6.00.

Report of Reconstruction Finance Corporation, Jan. 1940, letter from chairman, transmitting report of activities and expenditures for Jan. 1940. Reconstruction Finance Corporation. FL5.8:940/1

Same. (H. Doc. 638, 78th Cong. 3d Sess.)

Report of Reconstruction Finance Corporation, 4th quarter of 1939, letter from chairman, transmitting report of organization covering its operation for 4th quarter of 1939 and for period from organization of



MISCELLANEOUS (contd.)

corporation on Feb. 2, 1932, to Dec. 31, 1939. Mar. 11, 1940. 65p. Paper, 10¢. Reconstruction Finance Corporation FL5.7:939/4

Same (H. Doc. 654, 76th Cong., 3d Sess.)

MORTGAGES-Farm

Farm mortgage debt and farm investments of life insurance companies, tables and charts presented by Norman J. Wall, at hearings before Temporary National Economic Committee, Feb. 14, 1940. [1940/ (Processed.) Agricultural Economics Bureau A36.2: F22/50.

-Foreclosures

Non-farm real estate foreclosures. Mar. 1940. [May 7, 1940/ (Division of Research & Statistics.) (Processed.) Federal Home Loan Bank Board FL 3.8:940/3.

-General

Insured mortgage portfolio, v. 4, no. 11; May 1940. [1940/ cover title, 28 p. il. 4. (Monthly.) Paper, 15¢, single copy, \$1.50 a yr.; foreign subscription, \$2.10. Federal Housing Administration. FL2.12:4/11.

Rights of mortgagee--Mortgagee who failed to seek deficiency judgment after foreclosure sale held not entitled to additional security--53 Harvard Law Review 1400, June 1940.

Tenants payment to record senior mortgagee held no defense in action for rent by junior mortgagee.--53 Harvard Law Review 1402.

-Insurance

Property standards (requirements for mortgage insurance under title 2 of national housing act); pt. 6, Minimum requirements for Iowa, Des Moines, Iowa. Rev. May 15, 1940. 1940. (Circular 2; FHA form 2271.) Federal Housing Administration FL2.4:2/pt. 6, Iowa/940.

Same; pt. 6, Minimum requirements for Massachusetts, Boston, Mass. Rev. May 15, 1940. 1940. il/8p. (Circular 2; FHA form 2259.) Federal Housing Administration FL2.4:2/pt. 6, Mass./940.

Same; pt. 6, Minimum requirements for Ohio. Rev. May 15, 1940. 1940. il/9p. (Circular 2; FHA form 2253.) Federal Housing Administration FL2.4:2/pt. 6, Ohio/940.

MORTGAGES-Insurance (contd.)

Same; pt. 6, Minimum requirements for Oklahoma, Oklahoma City, Okla. Rev. May 15, 1940. 1940. 12/78p. (Circular 2; FHA form 2221.) Federal Housing Administration FL2.4:2/pt. 6, Okla./940.

PROPERTY

Implied reservations--apparent easements Case Note by Graham W. Talbott in 13 S. Cal. L.R. 525-27 (June 1940.)

Law and science; their cooperation in groundwater cases. Samuel C. Weil in 13 S. Cal. L.R. 377-392 (June 1940). A discussion of some of the problems confronting the courts in attempting to determine types of ground-water occurrence according to the current legal classification of subsurface waters, which calls for differentiation between ground water flowing in definite subsurface water courses and so-called "percolating waters".

TAXATION

Where improvements made by lessee constitute income to lessor for purposes of taxation: Comment by John A. Weyl in 13 S. Cal. L.R. 474-81 (June 1940).

TITLES

The resurrection of registration of title. by Percy Bordwell. 7 Univ. of Chicago L.R. April 1940, p. 470-488.











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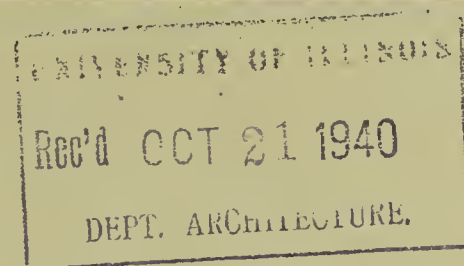
# · HOUSING · LEGAL DIGEST

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Number 74

September 1940



Modern Power of Sale Mortgage Foreclosure  
Act approved by National Conference of  
Commissioners on Uniform State Laws, Sep-  
tember 7, 1940. See page 1.

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
THE CENTRAL HOUSING COMMITTEE, WASHINGTON, D. C.

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## HOUSING LEGAL DIGEST

Issued monthly by the Sub-Committee on  
Legal Digest of the Central Housing  
Committee on Law and Legislation,  
1601 Eye Street, Washington, D. C.

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The staff of the Digest regrets to announce the transfer of Mary Watts from its staff, and takes this opportunity to acknowledge her faithful and extremely valuable services.

The Editors of the HOUSING LEGAL DIGEST endeavor to present as completely and impartially as possible material relating to housing legal problems: but they assume no responsibility for opinions expressed herein and no inference may be drawn as to their agreement or disagreement with viewpoints expressed.

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MODEL LAW
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## MODEL POWER OF SALE MORTGAGE FORECLOSURE ACT

APPROVED BY

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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The fact that in some states the foreclosure of a small home mortgage requires as much as two years to complete and involves an expense from \$300.00 to \$500.00, while in other states it can be completed in three or four months at a cost ranging from \$50.00 to \$100.00, is striking evidence of the need for revision of such laws to eliminate unnecessary delay and expense and at the same time protect the mortgagor against harsh or inequitable treatment.

A Uniform Mortgage Foreclosure Act was prepared by the National Conference of Commissioners on Uniform State Laws in 1927 but because of certain provisions therein, or for other reasons, it was never adopted by any state. The Central Housing Committee on Law and Legislation has been giving intensive study to this problem since 1936 when it prepared its first tentative draft of such a model act. It has worked in close cooperation with committees and representatives of various organizations interested in mortgage lending, as well as bar associations, title companies and Commissioners appointed by the Governors of the various states.

The draft prepared by the Central Housing Committee was first presented to the National Conference of Commissioners on Uniform State Laws at its annual meeting at Cleveland, Ohio in 1938 where it was discussed and referred to a special committee for revision. The revised draft was again presented to the Conference at its meeting at San Francisco in 1939 where it was again referred to the committee for further revision. It was then presented to the Conference at its recent meeting at Philadelphia where it was taken up section by section and after various changes, the draft set out below was finally approved by the Conference September 7, 1940. The Conference has indicated by the use of brackets those portions of the draft which it felt various states might wish to omit or amend.

It is believed that such approval will be of material assistance in securing its adoption by those states which now have unsatisfactory foreclosure laws.



MODEL POWER OF SALE MORTGAGE FORECLOSURE ACT

AN ACT TO REGULATE THE FORECLOSURE OF REAL ESTATE  
MORTGAGES UNDER A POWER OF SALE

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Be it enacted, etc. (Use the proper enacting clause for the state).

ARTICLE I - Definitions

SECTION 1. As used in this Act, the following terms have the following meanings:

(1) "Mortgage" means any form of instrument whereby a lien is created upon real estate or whereby title to real estate is reserved or conveyed as security for the payment of a debt or fulfillment of other obligation.

(2) "Mortgagor" means one who has executed a mortgage or who has an interest in the property subject to the mortgage, excluding junior mortgagees and lien holders.

(3) "Mortgagee" means the holder of the title transferred or the lien created by the mortgage or the holder of the debt or obligation secured thereby, or both.

(4) "Mortgage note" means a note, bond or other instrument evidencing an obligation secured by a mortgage.

(5) "Record owner of the mortgage" means one holding record title to the mortgage or his executor, administrator, guardian, or other personal representative, when proof of his appointment has been recorded.

(6) "Sheriff" means any officer authorized by the laws of this state to execute the processes of a court within the jurisdiction where a foreclosure sale is held.

ARTICLE II - Foreclosure

SECTION 2. APPLICATION OF ACT.

(1) Effect on existing mortgages - This Act does not apply to mortgages executed before it takes effect; but the parties to any such mortgage may agree to such application by a writing duly recorded where such mortgage is recorded.

(2) Court foreclosure - This Act shall not affect any right to foreclosure by proceedings in court.

(3) Power of sale - No mortgage executed after the effective date of this Act shall be foreclosed under a power of sale in any manner other than as provided herein, and said power of sale may be exercised by the record owner of the mortgage.

### SECTION 3. NOTICE OF SALE.

(1) Recording, publication and posting of notice - To foreclose a mortgage under this Act, a notice of sale shall be (a) recorded in each county in which the real estate covered by the mortgage is situated at least ninety days prior to the date of such sale stated in the notice; (b) published once a week for three successive weeks prior to such sale in a newspaper, printed in the English language, of general circulation in the county in which the mortgaged property is situated (and if the property is situated in more than one county, in each of the counties) or, if there be no such newspaper, in such newspaper in an adjoining county or in the nearest county in which such a newspaper is circulated, the first publication to be not more than thirty days prior to the date of said sale; (c) posted not less than ninety days prior to the date of sale on each noncontiguous parcel of the mortgaged property by affixing the same in a conspicuous location thereon and entry upon the property for the purpose of such posting shall be privileged; (d) delivered, or an attempt made to deliver, a copy to an occupant of the property if one is present at the time of posting; and (e) sent at least thirty days before the sale by registered mail at the last known address to the original mortgagor and to each person shown of record to be a subsequent grantee of the mortgaged premises or to have an estate or interest in or lien upon the premises subject or subsequent to the mortgage.

(2) Contents of notice of sale - Notice of foreclosure sale shall specify: (a) the names of the original mortgagor and mortgagee and of each successive record owner of the mortgage; (b) the date of the mortgage and the date and place of record; (c) the amount claimed will be due thereon at the date of sale; (d) a description of the mortgaged property; (e) the time and place of sale which shall be at the usual place of sale at the court house in the county where the mortgaged property or some part thereof is situated, or on the premises; and (f) the terms of the sale, including a statement as to the title or interest to be sold, the amount of unpaid taxes, assessments and liens, if any, prior to the lien of the foreclosed mortgage, the amount of the cash deposit required of the purchaser at the sale, and the time permitted the purchaser within which to pay the balance of the purchase price.



(3) Cancellation of sale - The party giving the notice of sale, or his nominee, may cancel such notice by executing and recording a notice of cancellation prior to the sale.

(4) Postponement - The sheriff may, in his discretion, postpone the sale from time to time in the absence of written objection by the mortgagor or by the party foreclosing and shall set forth the postponement in his certificate of sale. Not more than three postponements of not exceeding ten days each shall be had.

#### SECTION 4. SALE, HOW MADE, SEPARATE TRACTS.

(1) Upon presentation to the sheriff of a copy of the notice of sale, a fee of Ten Dollars for conducting the sale, and an affidavit of compliance with subsection 1 of Section 3, he shall proceed to sell the property at public auction to the highest bidder pursuant to the notice of sale.

(2) The mortgagee, the record owner of the mortgage, or any party having an interest in the mortgage, or the obligation secured thereby, may purchase the property or any part thereof at the sale.

(3) If the mortgaged property consists of separate farms, tracts, or platted lots not used as one, unless the mortgage otherwise provides, they shall be sold separately, and no more shall be sold than are necessary to satisfy the amount due at the date of sale, with costs of sale.

(4) If the title or encumbrances thereon be other than as stated in the notice of sale, to the disadvantage of the purchaser, he may, at his option, secure the return of his deposit and the cancellation of the sale at any time prior to the issuance of the certificate of sale. If the purchaser fails for any other cause to pay the balance of the purchase price within the time provided in the notice of sale, the party foreclosing may, at his option, obtain the cancellation of the sale and receive the deposit as liquidated damages. Cancellation of the sale shall not prevent the mortgagee thereafter from again exercising the right of sale in accordance with this act. If the mortgagee is the purchaser he may pay the purchase price by crediting the unpaid amount of the mortgage indebtedness and paying the balance of the purchase price, if any, and the costs of sale, in cash.

#### SECTION 5. CERTIFICATE OF SALE.

(1) The sheriff shall, within five days after receipt of the full purchase price, execute, in triplicate, a certificate of sale. He shall record one original where the mortgage and notice of sale have been recorded and shall deliver one original to the party foreclosing or to his attorney, either personally or by mail, and one original to the purchaser (if other than the record owner of the foreclosed mortgage), either personally or by

mail. Such certificate shall contain: (a) the names of the parties and date of the mortgage and the date and place of its record; (b) a description of the property sold; (c) the name and post office address of the purchaser and the amount of the purchase price; (d) the time and place of the sale; and (e) the time allowed for redemption.

(2) Such certificate shall, upon expiration of the time for redemption, operate as a conveyance to the purchaser of all estate and interest in the property on which the mortgage was a lien at the time of the sale but subject to liens prior to the mortgage.

(3) The recording officer shall note, on the margin of the record of the mortgage foreclosed, a reference to such certificate and the place of record.

(4) The certificate of sale and the record thereof shall be prima facie evidence that all the requirements of law for the sale have been complied with and shall, after the expiration of the time for redemption, be prima facie evidence of title in the purchaser and be conclusive evidence of a valid foreclosure in favor of parties who thereafter become bona fide purchasers or encumbrancers from the purchaser.

SECTION 6. PROCEEDS OF SALE AND SURPLUS. The proceeds of the sale shall be immediately applied by the sheriff, first to the payment of the costs of foreclosure, and then on the mortgage. Any surplus shall be retained by the sheriff for thirty days and then paid to the owner of the equity of redemption, unless prevented by an order of court or garnishment.

SECTION 7. EVIDENCE OF FORECLOSURE PERPETUATED. Evidence of the foreclosure proceedings may be perpetuated by recording:

(1) An affidavit of the publication of the notice of sale with a copy of the notice, made by the publisher of the newspaper in which the same was published or by an employee knowing the facts, and

(2) An affidavit of posting and mailing such notice of sale, pursuant to Section 3. Such affidavits, or the record thereof, shall be prima facie evidence of the facts therein set forth.

SECTION 8. ACTION TO SET ASIDE FORECLOSURE SALE.

(1) Procedure - At any time before the expiration of the period of redemption ~~/an action/~~ to set aside the sale may be commenced by any party who has an interest in the foreclosed real estate or who is obligated under



the instrument secured by the foreclosed mortgage. No order or decree setting aside the sale because of noncompliance with this Act shall prevent the mortgagee from again exercising the right of sale in accordance with this Act.

(2) Limitations on bringing action - No proceeding to set aside the foreclosure sale, directly or collaterally, shall be commenced or defect therein be asserted after the expiration of the period of redemption.

SECTION 9. REDEMPTION. At any time within nine months \*after the sale, the mortgagor or any person having a lien junior to the foreclosed mortgage may redeem the property by paying to the sheriff, for the account of the purchaser, the sale price with all costs, taxes and assessments paid by the purchaser, interest at the rate prescribed in the mortgage, and the cost of recording the redemption certificate /, and the additional sum of two and one-half dollars as a fee for executing the certificate of redemption<sup>7</sup>. The sheriff shall forthwith pay to the purchaser the redemption money and shall execute to the person redeeming or his nominee a certificate of redemption, setting forth the amount paid by him, and a description of the sale and of the property redeemed. The certificate shall be recorded by the sheriff and shall have the same force and effect as if prior to the foreclosure sale the mortgage had been fully paid and satisfied, leaving the property subject to all existing liens, except the lien of the foreclosed mortgage which is discharged thereby. When redemption is made by a junior lienholder the sum paid to redeem shall be added to the amount secured by his lien.

\*In accordance with the policy of giving farm owners one crop year after default, a redemption period of nine months is suggested to supplement the ninety days' notice before sale.

SECTION 10. DEFICIENCY JUDGMENT. Foreclosure under the provisions of this Act shall fully satisfy the obligation secured by the mortgage foreclosed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation.

SECTION 11. POSSESSION OF FORECLOSED PROPERTY. After the expiration of the redemption period without redemption having been made, the sheriff shall, upon demand, place the record holder of the certificate of sale in possession of the property and, if necessary, he shall apply to a court having jurisdiction, for such orders as shall enable him to perform his duty. Such orders may be issued ex parte and without notice upon the presentation of the recorded certificate of sale or a certified copy thereof, by the sheriff or certificate holder.

## SECTION 12. STATUTORY COSTS.

(1) There shall be allowed as costs of foreclosure to the mortgagee out of the purchase price the amounts actually paid or incurred: (a) for recording, publishing, posting and mailing the notice of sale; (b) to the sheriff for conducting the sale and executing and recording the certificate or certificates of sale; and (c) to the attorney conducting the foreclosure as fees therefor, not exceeding the following sums: When the unpaid balance of the obligation secured by the mortgage is \$500 or less, \$10; over \$500 and not over \$1,000, \$20; over \$1,000 and not over \$5,000, \$50; over \$5,000 and not over \$10,000, \$100; over \$10,000 and not over \$20,000, \$150; and over \$20,000, one per cent of such unpaid balance, but not in excess of \$500.

(2) The court, in proceedings under Section 8, may allow reasonable additional attorneys' fees as costs.

## ARTICLE III - General Provisions

SECTION 13. APPOINTMENT OF RECEIVERS. Any court having jurisdiction may appoint a receiver of mortgaged property if it appears that the mortgaged property is inadequate security for the obligation secured by the mortgage, or is in danger of being materially injured or reduced in value, by removal, abandonment, destruction, deterioration, accumulation of prior liens, waste, or otherwise.

SECTION 14. POWER OF ATTORNEY TO BE RECORDED. Any action by a mortgagee authorized by this Act may be conducted by his agent authorized by a power of attorney executed by the mortgagee and recorded in each office where the mortgage was recorded.

SECTION 15. POWER TO SUBSTITUTE TRUSTEES. When a mortgage takes the form of a deed of trust whereby title to real estate is conveyed to a party as trustee for a third party, as security for the payment of an obligation or the satisfaction of a legal duty to such third party, a majority in interest of the beneficiaries of such trust may, except as otherwise provided in the mortgage, by a written instrument duly executed and recorded in each office where such mortgage was recorded, from time to time, appoint substitute or successor trustee or trustees who shall, upon recording such instrument, become vested with all the rights, titles, interests, powers, privileges, duties and trusts of the trustee or trustees succeeded by such appointment. Nothing in this Section shall deprive a court of its power to substitute trustees.



SECTION 16. COMPUTATION OF TIME. In computing any period of time under this Act, the day of the act or event after which the designated period of time begins to run is not to be included in the computation. However, the last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Sundays and holidays shall be excluded in making the computation. A half-holiday shall be considered as other days and not as a holiday.7

SECTION 17. SHORT TITLE. This Act may be cited as the Power of Sale Mortgage Foreclosure Act.

SECTION 18. SEVERABILITY. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 19. REPEAL. All Acts, or parts of Acts, which are inconsistent with the provisions of this Act are hereby repealed.7

SECTION 20. EFFECTIVE DATE. This statute shall take effect \_\_\_\_\_, and shall apply to appropriate mortgages or other instruments executed thereafter.

DECISIONS

BUILDING AND LOAN ASSOCIATIONS - SHAREHOLDERS - INTEREST PAYMENTS

(In re Beckman, Superior Court of Pa., 14 A. 2d 581)

The shareholders of a building and loan association are not "creditors" in the ordinary sense, but they are really "partners" in the enterprise, and their rights are different from those of persons whose claims are based wholly on outside transactions. Lawful interest follows the principal and is an incident of a debt.

This was a proceeding by the Secretary of Banking of Pennsylvania, receiver of the Reliance Building and Loan Association. From an order allowing to the Iron and Glass Dollar Savings Bank of Birmingham interest upon the principal amount of its claim against the Reliance Building and Loan Association the receiver appealed. The assets of the building and loan association in liquidation was more than sufficient to satisfy outside creditors in full but insufficient, in addition, to return to shareholders the full value of their shares. In the distribution account of the receiver interest was allowed only to the date the receiver took possession of the insolvent association. The question involved is whether under the circumstances, interest accruing during receivership should be allowed on the undisputed claim of appellee, a general creditor.

The "Department of Banking Code" provides for the order and preference of paying claims by a receiver of an insolvent building and loan association, but is silent as to the payment of interest on creditor's claim. One subsection of the same code which applies to institutions other than building and loan associations denies interest to depositors in closed banks accruing after the date of taking possession by the Secretary of Banking. The appellant argued that because interest is denied a depositor in a closed bank there is stronger reason for the denial of interest to a general creditor of a building and loan association, in that a creditor's claim on general principle, is in fact of lower dignity than that of a depositor in a bank. However, the court, in allowing the claim for interest to the date of payment of the principal, stated:

"\* \* \* \* in Guardian Bank & Trust Co. Case, 330 Pa. 411, 199 A. 171 the Supreme Court made it clear that the language of subsection A, and that language alone, deprived depositors in closed banks of interest accruing during the period of liquidation. Therefore, the failure of the legislature to deny interest to creditors of building and loan asso-



ciations, leaves that question to be determined by established principles, since this code is in derogation of the common law and must be strictly construed. *Glenwood-Progressive B. & L. Ass'n Case*, 129 Pa. Super. 249, 195 A. 766.

"A clear statement of the rule governing the allowance of interest appears in *American I. & S. Mfg. Co. v. Seaboard A.L.R. Co.*, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949, quoted with approval by our Supreme Court in *Mortgage Bldg. & Loan Ass'n. Case*, 334 Pa. 81, 5 A. 2d 342, 352: "As a general rule, after property of an insolvent is in custodia legis interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of the principal and interest combined \* \* \* For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. But that rule did not prevent the running of interest during the receivership; and if, as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid." And again: "Principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full." That interest does not cease upon the appointment of a receiver ipso facto is also shown by *Scott v. Morris*, 9 S. & R. 123; *Shultz's Appeal*, 11 S. & R. 182; *Estate of the Bank of Penna.*, 60 Pa. 471.

"The fallacy of appellant's proposition lies in the assumption that the claim of a shareholder arising out of his ownership of stock is 'of equal dignity' with the claim of an outside creditor to interest during receivership. Shareholders 'are not creditors in the ordinary sense; they are really partners in the enterprise, and their rights are very different from those of persons whose claims are based wholly on outside transactions'. *Malis v. Homer Building & Loan Ass'n.*, 314 Pa. 321, 171 A. 570, 571. They are the owners of the building and loan association and for that reason their right to share in the company's assets is subject to the prior satisfaction of the company's debts. By *Sharps v. Homer B. & L. Ass'n*, 111 Pa. Super. 556, 170 A. 353, 354, and the authorities there cited, it may be regarded as settled that 'In the liquidation and winding up of the affairs of such associations the courts will see to it that, in enforcing his rights against the association, no person whose claim arose by reason of his being a shareholder should be permitted to prejudice the superior rights of creditors who are pre-

ferred to him.' Any other conclusion would be anomalous. As owners of the association the shareholders have a voice in its management, and they who direct its policies and share the profits must also bear the losses to the extent of the value of their shares.

"The rule is that the principal of a claim cannot be placed on a different footing from the interest accruing thereon. In *Com. v. Flowers*, 320 Pa. 73, 181 A. 485, 486, the Supreme Court said: 'The interest lawfully accruing upon each of the claims was as much a part of it as the original debt. The creditor had the same right to the payment of the one as of the other. \* \* \* Interest, in its very nature, is but an incident of a debt, and therefore partakes of its kind; and when detached from the principal becomes itself a debt.' (Citing cases) As Mr. Justice Sharewood aptly said in *McCalla v. Ely*, 64 Pa. 254: 'Lawful interest \* \* \* follows the principal as the shadow does the substance.'"

CONTRACTS - FEDERAL LAND BANK - LOAN APPLICATIONS

(Johnston v. Federal Land Bank of Omaha, et al. - - - Iowa  
- - -, August 1940)

A Federal Land Bank is not liable for breach of contract  
when it refuses to close a loan after the approval of an  
applicant's application for a loan and after having received  
a duly executed note and mortgage.

This was an action to recover damages claimed by plaintiff Johnston to have been suffered because the defendants failed to consummate a loan with which he expected to pay off a mortgage at a substantial reduction. The defendants denied that there had been a completed contract between the parties, in which contention they were upheld by the courts.

The plaintiff through the Cherokee County National Farm Loan Association made application for a loan of \$15,000 from the Federal Land Bank of Omaha, which was to be secured by a first mortgage. The application was approved by the loan association and sent to the Federal land bank which approved a loan in the sum of \$10,500 to be made by the bank and \$2500 to be made by the commissioner. The bank sent to Bell, secretary-treasurer of the association, mortgages and notes filled out except as to signature. They were signed by plaintiffs (husband and wife) and were placed on record by Bell, without authority from the bank.

The loan was subsequently rejected and the bank returned the mortgages, and releases of them. Plaintiff was notified by Bell of this cancellation but neither he nor his attorneys called for the papers nor apparently manifested any interest therein. An effort was made to have the application reinstated, which was done about two years after the rejection. A few days after the application was reinstated the applicant died which made further action impossible.



It appears, however, that about a year after the rejection Johnston had filed his petition in this case demanding recovery of the \$13,000 which he alleged to be the value of the equity in his land, and which was lost, as he claimed, because of the failure of the bank and the commissioner to consummate the loan.

The superintendent of banking, plaintiff in the foreclosure suit, filed an application one year after Johnston's death, against the administratrix and heirs of Johnston, asking among other things that special execution issue. The court ordered defendants to execute a deed to the superintendent of banking and failing therein, that the clerk be authorized to make such deed as commissioner. The deed was executed by the clerk.

Plaintiff's first complaint herein was that the court erred in directing a verdict on defendant's ground that "the undisputed evidence fails to show that any contract existed which obligated the Federal Land Bank to make a loan to the plaintiff's decedent." Plaintiff cited the case of Federal Land Bank v. Warner, 23 P. 2d 563, 292 U.S. 53, 78 L.Ed. 1120.

The plaintiff in another argument cited the same case and the court said it failed to see its applicability. The court in holding that no completed contract had been entered into said:

"Appellant asserts that the stipulation of the application, to which reference will be made, was illegal and void and beyond the power of the bank to make under its charter. She cites section 771, Title 12, Chapter 7, U.S. Code; Meek v. Wilson (Michigan), 278 N.W. 731; Nute v. Insurance Company, 6 Gray 174; Section 733 of Title 12, Chapter 7, U.S. Code. We do not read these citations to the effect claimed for them. It is clear that all parties understood that everything that had been done prior to the death of Johnston was with the purpose and intention of coming to terms on the loan in contemplation of the parties. Much is said in plaintiff's argument about a completed contract to make a loan. We take no time to discuss this because the record does not sustain it. At the very time Johnston died, the application had been reinstated as the result of his efforts or someone in his behalf to bring about the result. Certainly if he had believed that he had a completed contract which would afford the basis for a claim for damages when the approval of the loan was withdrawn in June, 1934, he would not have been concerned with a reinstatement. Moreover Johnston's application expressly stipulated:

"I agree that approval of this application, if granted, may be withdrawn by the Bank or Commissioner any time before the loan is finally made without any liability or obligation to me of any nature."

"But it is said that the mortgages were placed of record thus completing the contract. There is nothing in the record to indicate that this was done with the knowledge, consent or approval of the defendants or of anyone acting in their behalf. The notes and mortgages, with releases of the latter, were returned two days after they had been sent to the bank by Bell. There is nothing in the record to warrant the thought that Bell was acting as agent for anyone but Johnston. Throughout appellant's argument runs the thought that the acceptance of the loan in 1934 resulted in a completed agreement. We have already pointed out that plaintiff's application provided that the 'approval of this application \* \* \* may be withdrawn \* \* \* at any time before the loan is finally made \* \* \*.' Even without this stipulation, plaintiff's case must fall because the mere approval of the application did not make a contract. See 4 L.R.A. (NS)177; First Tr. J.S.L.Bk. v. Diercks, 222 Iowa 534, 267 NW. 708; Starry v. Starry & Lynch, 212 Iowa 274, 234 N.W. 281; Harris v. Bills, 203 Iowa 1034, 213 N.W. 929; Peterson v. Jenson, 189 Iowa 400, 177 N.W. 74.

"Another contention of the appellant is that the provision of the application above quoted was 'void because it was an attempt to deprive the courts of jurisdiction to hear and determine any and every dispute between the bank and Johnston'. We cannot read this provision of the application to any such conclusion. Oskaloosa Sav.Bk. v. Nahaska Co. St. Bk., 205 Iowa 1351, 219 N.W. 530, and other authorities do not support plaintiff's contention. Again it is said that this provision 'was a waiver of rights in futuro and was not pleaded defensively and not being based upon a consideration was void.' It would seem to require no argument to demonstrate, in the light of what has gone before, that this contention is without merit. We content ourselves here with setting out the authorities which plaintiff cites. They do not support her. See Section 11209, 1939 Code of Iowa; Howe v. Sioux County, 180 Iowa 580, 163 N.W. 411; Ford v. Ott, 186 Iowa 820, 173 N.W. 121; Schworm v. Reserve Society, 168 Iowa 579, 150 N.W. 714; Dolan v. Newberry, 200 Iowa 511, 202 N.W. 545; Gurnett v. Ins. Co., 124 Iowa 547, 100 N.W. 542; Hollis v. The State Insurance Company, 65 Iowa 454, 21 N.W. 774."

#### EMINENT DOMAIN - MUNICIPAL CORPORATIONS

(Con Realty Company v. Ellenstein et al, - - - N.J. - - -, 14 A 2d 544)

Where a city street was vacated in order to facilitate the building by local housing authority of needed sanitary and safe dwelling accommodations for persons of low income and the elimination of existing unsafe housing conditions, the vacation of the street could not be questioned on ground that it was arbitrary and unreasonable.



The New Jersey Supreme Court held that an ordinance adopted by the Board of Commissioners of the City of Newark providing for the vacation of a part of Sheffield Street as a public street or highway in the exercise of the authority conferred by Section 1, subdivision (b) of Article XXII of Chapter 152 of the Laws of 1917 (Pamph. L, pp. 319, 404) as amended, No. R. S. 1937, 40:67-1b, which was designed to permit the consummation of a housing project undertaken by the Housing Authority of the City of Newark, a body corporate and politic created under the authority of the United States Housing Act of 1937 (U.S.C.A. Title 42, Sec. 1401 et seq.) and Chapter 19 of the New Jersey Session Laws of 1938 (Pamph. L, p. 65; R. S. 55; 14A-1 et seq.) pursuant to the grants of power therein also made, is not subject to judicial review, unless tainted with fraud, or palpably not in the service of the public interest, or otherwise a clear perversion of power.

#### HOMESTEAD

(Bigelow et al. v. Dunphe, Fla., 197 So. 328).

Where husband was incapacitated from working and wife provided for the family and conducted all phases of the family's affairs, a house belonging to the wife, into which the family moved, and which was occupied by them for about 25 years, was a "homestead" and wife was "head of the family" within a constitutional provision that "homestead" owned by "head of family" shall not be alienable, without joint consent of husband and wife.

This suit brought by plaintiff, Dudley C. Dunphe, as executor of the last will and testament of Margaret C. Dunphe, sought foreclosure of a mortgage executed by a wife, a free dealer, to the assignor of plaintiff's testatrix.

It appears that husband and wife lived together for thirty-five years but that the husband had been incapacitated both mentally and physically for over twenty-five years and that the wife provided for the family from an orange grove inherited from a former husband. They have occupied the property as a home since 1925, the year it was deeded to the wife. She owned the house and was in fact the family head.

The chancellor held that the mortgage should be foreclosed because of the failure to disclose to the mortgagee the circumstances establishing the status of the woman and the property and rebutting the presumption that the husband was the head of the family rather than the absence of such facts. He took the view that "It should have been made to appear at or before the execution of the mortgage \* \* \*" that the headship was not in the husband.

However, the condition of the title and the authority of the married woman to act as a free dealer could have been learned from public records but the use of the property could not necessarily have been ascertainable there. The question arises, then, whether the lender could have accepted the mortgage without investigation of the use because of an obligation on the part of the borrower to advise him of the homestead character of the property or he was charged with inquiring as to the nature of the possession at the time of the encumbrance.

The court in holding that there was a good homestead claim said:

"It is written in Thompson on Real Property that the purchaser of property is put upon inquiry as to the title or interest of one in possession (Vol. 5, Sec. 4244) and in dealing with possession as notice of homestead rights in the same work (Sec. 4253, text p. 341) the quotation from Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S. W. 12, 13, was given:

" 'The fact of actual possession and use, as the home of the family, was one against which the lender could not shut his eyes \* \* \*. Every person dealing with land must take notice of an actual, open and exclusive possession; and when this, concurring with interest in the possessor, makes it homestead, the lender stands charged with notice of that fact, it matters not what declarations to the contrary the borrower may make.' "

"We are aware of the difference in phraseology of the Florida and Texas Constitutions but think that the principle is not affected by it.

"In 13 R. C. L. at page 588, we find the statement:

" 'In a majority of the states occupancy of a place by a family is presumptive evidence of its appropriation as a homestead, and is notice to all the world of that fact \* \* \*.' "

\* \* \* \*

"The Constitution, Article X, provides that:

" 'A homestead \* \* \* owned by the head of a family residing in this State \* \* \* shall not be alienable without the joint consent of husband and wife, when that relation exists.' Section 1.

"The following exposition of the real purpose for the protection of the homestead is selected from 26 American Jurisprudence, page 10:

" 'Homestead laws are founded upon considerations of public policy, their purpose being to promote the stability and welfare of the



state by encouraging property ownership and independence on the part of the citizen, and by preserving a home where the family may be sheltered and live beyond the reach of economic misfortune. The statutes are intended to secure to the householder a home for himself and family, regardless of his financial condition--whether solvent or insolvent--without reference to the number of his creditors, and without any special regard to the extent of the estate or title by which the homestead property may be owned. The laws are not based upon the principles of equity; nor do they in any way yield thereto; their purpose is to secure the home to the family even at the sacrifice of just demands, the preservation of the home being deemed of paramount importance.'

"When a study is made of the underlying purpose for the protection of the home vouchsafed in the Constitution the position of the appellee here that he accepted a mortgage executed by a free dealer and presumed that her husband was the head of the family, hence was unaware of the fact that the property was possessed and used as the home, loses its strength.

"Thus the organic law is given the full force to which it is entitled.

"The authority given the married woman to become a free dealer is founded upon statute and by it she may trade as a feme sole, but one who deals with her may not indulge the presumption that because she executes a mortgage alone on property owned by her she is not the head of her family and the property is not a homestead. If, as in this case, it develops that the land though hers is in fact of this character and she has become the family head, then the mortgagee is left with an invalid instrument which could have been avoided by investigation on his part."

#### HOUSING - STATE HOUSING ACTS

(New York v. Brooklyn Garden Apartments, N. Y. Ct. Appeals, July, 1940, 9 L.W. 2115)

Amendment to New York Housing Law providing that private limited dividend housing companies must pay all or such part of supervision expenses as State Housing Board requires does not impose a tax or fee in violation of exemption granted by law authorizing organization of such companies and is not unconstitutional.

The State brought an action against a company to collect its share of the supervision expenses fixed by the Board. The company was organized in 1928 when formation of companies to construct and maintain low-cost housing projects was encouraged by the State Housing Law (L. of 1926, Ch. 823). Among the special privileges granted such companies was

exemption from "all franchise, organization, income, mortgage recording and other taxes to the State and all fees to the State or its officers."

While the law provided for a State Board of Housing to be charged with the obligation of supervising construction, maintenance, rentals and accounting, there was no provision requiring the payment of its expenses by companies organized under the law. An amendment effective in 1934 provided that the expense of supervision of such part thereof as the Board might fix should be paid by the companies, but it directed them to shift the burden of the payments to their tenants.

The amendment is applicable because "it relates to all limited dividend housing companies whenever organized \* \* \* merely \* \* \* adding, for the future, a new item \* \* \* their expenses."

No constitutional guarantee is violated by the amendment because the direction to pay a share of the Board's expenses is not a tax or fee within the exemption granted and neither the power given the Board to act without a hearing nor its power to allocate expenses can be considered objectionable under the authorities cited.

#### MORTGAGES - FORECLOSURE

(HOLC v. Everett O. Richards et ux, Neb., 293 N.W. 111)  
An order confirming judicial sale under foreclosure decree  
will not be reversed on appeal for inadequacy of price where  
there was no fraud or shocking discrepancy between the  
value and sale price, and where there was no satisfactory  
evidence that a higher bid could be obtained in the event  
of another sale.

In an HOLC foreclosure suit it bid in the property for the full amount of its debt, i.e., \$2,775.22. Despite objections of the mortgagors that the price was inadequate and that at a resale the property would bring more, the court confirmed the sale, and the mortgagors appealed to the Supreme Court of Nebraska. That Court affirmed the judgment of the trial court and in so doing, said:

"This case presents the question: Did the trial court err in confirming a sale under a decree of foreclosure? As of the date of the sale, the total due on the decree was \$2,775.22. The property was sold for \$2,775.22.

"Witnesses, with varying qualifications, testified for both parties as experts on values. Plaintiff's witnesses fixed the value at from \$2,000 to \$2,500. Defendants' witnesses fixed the value at from \$3,200 to \$4,500. The elements entering into their determination of values were varied. There is no assurance that a subsequent sale would result in a higher bid.



"This court has on many occasions declined to set aside a confirmation under these circumstances. In *Equit-Life Assurance Society v. Buck*, 9 SCJ 809, this Court stated:

"An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale."

MORTGAGES - JUDGMENT

(*Vogel v. Edwards*, Court of Appeals of New York, 27 N.E. 2d 806)

A judgment of foreclosure and sale of mortgaged realty should be regarded as granted as of the date of its rendition and not of the date of its entry on record. The act of rendering judgment by the justice is judicial; that of entering it in his docket is ministerial. The judicial functions of the justice are completed when he has rendered his judgment.

The plaintiff obtained a judgment of foreclosure and sale against property of defendant and the referee was directed to file a report of sale specifying the amount of a deficiency to be entered. The judgment was signed by the justice on August 25, 1933, but was not entered until August 29, 1933. Meanwhile on August 28, 1933, there became effective section 1083-a of the Civil Practice Act. The question arose as to whether the Supreme Court should have granted defendant's motion to open the deficiency judgment, after foreclosure had been granted. In reversing the decision of the New York Supreme Court, the appellate court said:

"In the case at hand our decision turns upon the question whether a judgment of foreclosure and sale is to be regarded as granted as of the date of its rendition or the date of entry. 'The act of rendering judgment by the justice is judicial; that of entering it in his docket is ministerial. The judicial functions of the justice are completed when he has rendered his judgment.' *Fish v. Emerson*, 44 N.Y. 376, 378, 379. See *Black on Judgments*, sec. 106, pp. 113, 114; *Freeman on Judgments*, 5th ed. 7 sec. 46, pp. 75, 76. The entry may be important for certain purposes, as for example, the creation of a lien or fixing the date from which is computed the time to appeal.

"The judgment herein which the defendant seeks to open was rendered August 25, 1933, on which date section 1083 of the Civil Practice Act provided the applicable law. The judgment was rendered in conformity with that law. The rights of the parties then became vested (*Livingston v.*

Livingston, 173 N.Y. 377, 382, 383, 66 N.E. 123, 61 L.R.A. 800, 93 Am. St.Rep. 600), and thereafter Special Term had no power to open the judgment and give effect to section 1083-a which, by its terms, applied only to judgments of foreclosure and sale granted after August 28, 1933, its effective date. The judgment here involved was granted before the effective date of that Statute.

"The relief granted by Special Term was not within its equitable powers. *Emigrant Industrial Sav. Bank v. Ban Bokkelen*, 269 N.Y. 110, 115, 116, 199 N.E. 23; *Guaranteed Title & Mortgage Co. v. Scheffres*, 275 N.Y. 30, 9 N.E.2d 764."

#### TITLE INSURANCE - HOME OWNERS' LOAN CORPORATION

(Matter of Proceedings under Mortgage Company Corporation Rehabilitation Act affecting Citizens Title Insurance and Mortgage Company. In Chancery of New Jersey, July 31, 1940.)

The HOLC is entitled to share ratably with holders of guaranteed mortgages in distribution of statutory deposit made by insolvent title insurance and mortgage guarantee company, although HOLC had sustained no loss on loans covered by title policies and its claim was limited to cost of re-insuring in other title insurance companies.

In the liquidation of the Citizens Title Insurance and Mortgage Company, a controversy arose as to a claim filed by HOLC. The Chancery Court of New Jersey decided it as follows:

"This matter is now before the Court on a claim of the Home Owners' Loan Corporation. The Citizens Title Insurance and Mortgage Company issued some 112 title insurance policies, each for \$1,000.00 to the Home Owners' Loan Corporation, for which there was paid a premium of \$40.00 each. The policies insured against defects of title on premises on which the Home Owners' Loan Corporation made loans. No losses have occurred as yet because of defects of title on any of the premises. The Citizens Company is now in liquidation and the question before the Court is as to what claim, if any, the Home Owners' Loan Corporation has against the statutory deposit originally made with the Department of Banking and Insurance for the protection of policy-holders. It is claimed on behalf of the Home Owners' Loan Corporation that the statutory deposit should not be used to pay other creditors until the asserted prior claim of the Home Owners' Loan Corporation has been satisfied, either by the payment to it in full of the cost of re-insurance of the policies issued to it, or that the statutory deposit be kept intact to satisfy future claims of Title policyholders.



"To determine the rights of the Home Owners' Loan Corporation, it is necessary to pass upon the rights that others, namely, the holders of guaranteed mortgages, may have against the statutory deposit. It may be noted that the claims of the Home Owners' Loan Corporation are contingent only, and losses may or may not mature in the future; whereas, in the case of the holders of guaranteed mortgages, the claims have already matured and losses have already been sustained, since there have been defaults on the guaranteed mortgages and the assets of the Company are admittedly insufficient to pay them in full.

"The Citizens Company made the statutory deposit under the provisions of The Insurance Company Act of 1902, which provides for the organization of corporations to insure against defects in title or by reason of non-payment of principal and interest of bonds and mortgages. Under this statute, the deposit is 'for the benefit and security of all policyholders of the company depositing the same'. The first relevant question is as to whether holders of guaranteed mortgages are to be considered policyholders under the statute. Elsewhere in the statute, reference is made to 'policies of title or mortgage insurance'. The Mortgage Guaranty Corporation Rehabilitation Act of 1934 provides that it shall apply to any mortgage guaranty corporation 'which has issued insurance against losses by reason of the non-payment of principal and interest of bonds and mortgages'. This recognizes the status of guarantees of mortgages as being contracts of insurance and seems plainly to recognize them as policies within the meaning of the Act of 1902. The statutory deposit, therefore, is for the benefit, not only of holders of title insurance policies, but also for the benefit of guaranteed mortgages. This was held in the case of Aetna Casualty Company v. International Re-Insurance Corporation, 117 N. J. Eq. 190, at page 199.

"Therefore, the claim of the Home Owners' Loan Corporation, for whatever amount it may be found to be, can only share pro rata with the holders of guaranteed mortgages against the statutory deposit.

"It is contended on behalf of the Trustee in Liquidation that the Home Owners' Loan Corporation has no provable claim at all, since the only obligation of the Citizens Company under its policies of insurance is to pay losses incurred by reason of defective titles, and that no such losses have been or can be proved up until the present time, there can be no claim whatever. The Home Owners' Loan Corporation paid \$40.00 each for the policies and in each case has received, to a certain extent, a consideration therefor, that is to say, the benefit of a search. But this does not entirely discharge the obligation under the policy, since at some time in the future defects in title may appear. It would, however, be clearly unjust and improper to indefinitely tie up the statutory deposit while waiting for such claims to mature. The rule of practicality and convenience requires that in cases such as this, the claims be disposed of once and for all.

"In the present instance, the amount of the claim of the Home Owners' Loan Corporation may be readily determined as the cost of re-insurance. This cost has not been laid before the Court, but it is concededly far less than the \$40.00 per policy, since re-insurance can be obtained on the group of more than 100 policies. The principle of making provision for contingent claims, instead of completely wiping them out by distribution of all assets, has been recognized as a principle of equity in the recent cases of Aetna Casualty Company v. International Re-Insurance Corporation, supra, and in Beatty v. Paterson-Garfield-Lodi Bus Company, 126 N. J. Eq., page 475.

"The claim of the Home Owners' Loan Corporation will, therefore, be allowed in the amount of the cost of re-insurance on its title policies. This amount can probably be determined by agreement between the respective counsel. If not, the amount will be fixed by the Court on presentation of further facts. The Home Owners' Loan Corporation will receive no preference against the holders of guaranteed mortgages as against the statutory deposit, but will share pro rata with them. An order will be advised in accordance herewith."

#### TAXATION - AUCTION SALES

(People v. Antinori, Appellate Court of Illinois, 28 N.E. 2d. 493)

A "cash" sale means payment in full at the time, in currency or its equivalent. Where decree of foreclosure of tax liens stated that the real estate would be sold at public auction for cash, the county treasurer could not accept a bid with partial payment on account accompanied by a promise to pay balance after confirmation of sale.

Foreclosure proceedings were brought by the State of Illinois against Rose Antinori and others. The petitioner, Charles Ross, questioned the ruling of the trial court which refused him leave to file his petition in which he attacked the action of the county treasurer in refusing to accept his bids at a tax foreclosure sale.

The foreclosure sale was conducted by the county treasurer through his representative. The petitioner through his counsel attended the sale and made the highest and best bids for the real estate being sold. The property was sold to the petitioner who offered to pay part of the purchase price by cashier's checks and the balance after confirmation of the sale by the court. The treasurer refused this offer.

The appellate court in affirming the ruling of trial court which refused the petitioner the right to file his petition stated:



"In *People v. Cant*, 260 Ill. 497, 500, 103 N.E. 232, the court held that the usual practice in the foreclosing of tax liens under the Revenue Act was to decree a sale for cash to the highest bidder. The decree of foreclosure in the instant case ordered the county treasurer to sell the parcels of real estate at public auction for cash. The publication of the notice of sale stated that the sale should be for cash and chapter 120 (Illinois Revenue Act) section 247, provides that sales in foreclosures for delinquent taxes shall be for cash. The petitioner contends that he was entitled to withhold the balance of his bids until after the confirmation of the sale by the court. This would be unreasonable. A "cash" sale means payment in full at the time, in currency or its equivalent. The county treasurer could not under the terms of the decree accept a bid with partial payment on account and a promise to pay the balance at some future time. The decree contemplates that the sale shall be, in fact, accomplished before the county treasurer submits his report of sale to the court."

#### TAXATION - BUILDING AND LOAN ASSOCIATIONS

(Commissioner of Corporations and Taxation v. Flaherty  
Supreme Judicial Court of Massachusetts, 28 N.E. 2d 433)  
A tax which is imposed on income received by shareholders  
in a Federal savings and loan association, but not on in-  
come of state-chartered cooperative banks, which conduct  
substantially similar business, is invalid as discrimin-  
atory against shareholders in the Federal association.

This is an appeal by the Commissioner of Corporations and Taxation from an order of the Appellate Tax Board granting an abatement of an income tax, assessed by virtue of G.L. c.62, as amended by Statutes 1937, c.395, section 1, upon the dividends received by appellee in 1937 on the share accounts owned by him in the Worcester Co-operative Federal Savings and Loan Association. This association was organized and incorporated under the Home Owners' Loan Act, 48 U.S.Stat. 128. Congress was empowered to create the Home Owners' Loan Corporation as provided for by the Home Owners' Loan Act. *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607; *Graves v. New York*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 607; 927 and other cases.

"If the creation of such Federal instrumentalities as savings and loan associations was a valid exercise of congressional power, and if the activities of such associations are governmental functions and so entitled to whatever immunity would attach to those activities if they were performed by the government itself, then it was within the competency of Congress to preserve the integrity of these agencies, to protect their operations within their respective fields, and to prevent interference by the States with their lawful activities."

The court in upholding the abatement of the income tax and finding that the tax discriminated against the income received from a Federal fiscal agency and in favor of income received from State co-operative banks stated:

"The act in reference to savings and loan associations provides, U.S.C. Title 12, sec. 1464 (h), 12 U.S.C.A. sec 1464 (h), that 'no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.' The tax now assailed does not offend this provision because it was not assessed upon the association or its property. It was laid upon the income of an individual. The incidence of the tax was the receipt of income by him. *Holvering v. Therrell*, 303 U.S. 218, 58 S.Ct. 539, 82 L.Ed. 758; *Graves v. New York*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927, 120 A.L.R. 1466. The question is not the right of the Commonwealth to tax the association. The act last cited does not reach the question now in issue as it neither sanctions nor inhibits State taxation of income from the shares in this association. A tax upon the association is different from a tax upon its customers, depositors and shareholders. *Clement National Bank v. Vermont*, 231 U.S. 120, 34 S.Ct. 31, 58 L.Ed. 147; *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 111, 44 S.Ct. 23, 68 L.Ed. 191; *Colorado National Bank of Denver v. Bedford*, 60 S.Ct. 800, 84 L.Ed. \_\_\_\_\_, decided April 22, 1940.

"The appellant contends that the tax on the income received from shares in these associations is not protected by any act of Congress from the imposition of a State tax, and that immunity from such taxation on the ground that the association is an instrumentality of the Federal government is no longer tenable. The performance by the Federal government of the functions delegated to it cannot be prevented or impaired by the exercise by the State of taxing power reserved to it. That principle, we think, has always been observed, although the boundaries of immunity enjoyed by one against the other have been restricted by a series of recent decisions of the Supreme Court of the United States. It is now settled that the immunity of a governmental or State agency from taxation does not accrue to a taxpayer who has received income from such an agency. [citing cases].

"The appellee does not challenge the authority of the Commonwealth to lay a tax on income received by shareholders in a Federal savings and loan association, but contends that the receipt of such income cannot be taxed if no tax is laid upon the receipt of similar income by the shareholders of a co-operative bank. Our inquiry is whether the instant tax is discriminatory against the shareholders in these associations and therefore void.



"Taxes assessed upon income derived from private and governmental sources alike have been sustained provided they do not substantially interfere with the performance of governmental functions. /citing cases/ But that the tax must not discriminate against income received from the government seems clear from the reasoning in the decisions upholding a tax upon such income, in which the court points out that the tax is non-discriminatory. It was said in *Helvering v. Gerhardt*, 304 U.S. 405, 413, 58 S.Ct. 969, 972, 82 L.Ed. 1427; that 'Such discrimination was later recognized to be in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities.' /citing cases/

"The tax in question was assessed to the appellee under the provisions of G.L. (Ter. Ed.) c. 62, as amended by St. 1937, c. 395, sec. 1. See *Brink v. Commissioner of Corporations & Taxation*, 299 Mass. 280, 13 N.E. 2d 2. The phraseology of this last section was broad enough to include the taxation of dividends received by the appellee; but the section expressly exempts any income received from shares of 'co-operative banks, building and loan associations \* \* \* chartered by the commonwealth.' There is nothing contained in our income taxing statutes that imposes upon holders of shares in co-operative banks any taxing liability which might be considered as compensatory for this exemption. Notwithstanding the broad power inherent in a State to select and classify subjects for the imposition of a tax, *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87, 118 A.L.R. 1142; *Whitney v. Tax Commission*, 60 S.Ct. 635, 84 L.Ed. \_\_\_, decided March 25, 1940, we are unable to find any rational difference, having a fair and substantial relation to the object of the taxing statute, between the income received by shareholders of such an association as that under consideration and that received by the shareholders of co-operative banks that would justify taxing the former and exempting the latter. The business conducted by each is substantially similar; and the fact that one is chartered by and under the supervision of the Federal government while the other is incorporated by the Commonwealth and is under the supervision of the State is not such a difference as will warrant the taxing of dividends received by a shareholder in the first and not in the second. The tax discriminates against the income received from a Federal fiscal agency and in favor of income received from State co-operative banks. Such an exercise of the taxing power cannot be sustained." /citing cases/

#### ZONING

(*Rommell v. Walsh*, July, 1940. Conn. Sup. Ct. Errors, 9 L.W. 2116.)

Zoning Board may appeal from decision of county court setting aside its order although such appeal is not authorized by statute.

Certain property owners claiming to be aggrieved by an order of the zoning board appealed to a county court and secured a judgment setting aside the order. The zoning board now appeals and some of the property owners affected by the order assert that it does not have any right of appeal since it is given no statutory authority to do so.

The motion to dismiss the appeal is denied. Although the case "presents a question which we have never had occasion to determine, we believe that there is a definite public interest to be protected" and "the public interest should be represented." This view is supported by the fact that there is no provision requiring the city to appear as a party defendant in zoning cases.

Text "We know of no compelling reason why an administrative board, where it represents the public interests entrusted to its care, may not, as such, be made or appear as a party defendant in an appeal taken from an order it has made or may not, where the trial court has overruled its decision, prosecute an appeal to this court. The frequency with which such a practice has been followed in the case of boards performing administrative functions indicates that it conforms to a general understanding that the procedure is proper and apt for the determination of the issues in litigation. \* \* \*

"We are aware that there are decisions in other jurisdictions not in harmony with these conclusions. Zoning Board of Appeals v. McKinley, 171 Md. 551, 199 A. 540, \* \* \* likens an appeal from a board of zoning appeals to one taken from a court, an analogy that fails to take into account the vital difference we have pointed out between them, and particularly the fact that such boards, while not directly interested in the subject-matter of the litigation, may be charged with a duty of protecting public interests involved in the appeal."

#### ZONING

(Baker v. Semerville et al., \_\_\_ Neb. \_\_\_, 293 N.W. 326)  
A city zoning ordinance does not operate retroactively to  
deprive a private lot owner of previously vested property  
rights. A zoning ordinance based alone on aesthetic stan-  
dards and so operating as to prevent a lot owner in a  
residential district from constructing thereon a one-  
story home does not promote public health, public safety,  
morals or the general welfare and in that particular is  
void as beyond the police power of the city.

The plaintiff obtained an injunction preventing defendants from proceeding further in the construction of a partially erected dwelling house on the grounds that the building planned failed to conform to certain zoning ordinances. It appeared that the defendants obtained a



permit to build a one-story house, with less than 2,000 square feet of floor space. The other houses in the district are two-story homes with not less than 2,000 square feet of floor space. However, the house planned to be built indicated an attractive one and larger than the usual one-story houses. The cost of the house would be as much as some of the two-story houses in the district.

The question here is whether the injunction granted to plaintiff to stop defendants from erecting their partially completed house was properly granted. The injunction was granted after the original permit had been granted to build the house and after the defendants were allowed to continue following inspection by building inspectors of the city to see that the house was being built according to the original permit.

The objections to the building were directed principally to a one-story house among two-story residences, to setbacks from streets and to limitation of floor space less than 2,000 square feet, all in asserted violation of zoning ordinances and which plaintiff and intervenors testified would depreciate the value of the surrounding properties.

After plaintiff failed to prove that certain restrictions contained in defendants' deed to the property were now in force, he resorted for equitable relief to a city zoning ordinance requiring the floor space of a one-story residence to contain 2,000 square feet. As to this the court said:

"\* \* \* This provision was extended by a subsequent change in the ordinance to the lot of the Somervilles after they bought it, procured their building permit and invested \$5,600 in the building of their home. They acquired vested rights by contract and by expenditure of money before the city extended this regulation to their property. It is well-settled law that an ordinance cannot operate retroactively to deprive them of their previously vested rights. *Kerwin v. Thompson, Belden & Co.*, 110 Neb. 251, 192 N.W. 692; *Travelers' Ins. Co. v. Ohler*, 119 Neb. 121, 227 N.W. 449, 450. In the latter case this rule was adopted: 'A legislative act will not be permitted even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights.'

"The supreme court of Iowa held: 'A building permit issued upon full showing of the nature and character of the building to be erected and the use to be made thereof, the plans of which are approved by the proper officers, cannot be revoked by the municipal authorities merely because of protest and opposition by the owners of neighboring property.' *Rehmann v. City of Des Moines*, 200 Iowa 286, 204 N.W. 267, 40 A.L.R. 922.

"This is in harmony with the weight of authority. See note in 40 A.L.R. 928 et seq. Failure to comply with the ordinance requiring a floor space of 2,000 square feet in the one-story home is not, therefore, a ground for the injunction."

In regard to the building of a one-story house in a neighborhood where there are two-story houses the court said:

"\* \* \* The restriction to prevent construction of one-story homes resulted alone from aesthetic standards of the city lawmakers. Beautiful city residences, homologous lines in architecture and symmetry in construction appeal to artistic tastes and should be respected in connection with substantial zoning regulations for the promotion of the public welfare, but aesthetics alone for the purpose of zoning ordinances do not seem to be a source of police power, according to the weight of authority. The New York Court of Appeals said: 'Aesthetic considerations are, fortunately, not wholly without weight in a practical world. Perhaps such considerations need not be disregarded in the formulation of regulations to promote the public welfare. Matter of Larkin Co. v Schwab, 242 N.Y. 330, 151 N.E. 637. 'Public welfare' is a concept which in recent years has been widened to include many matters which in other times were regarded as outside the limits of governmental concern. As yet, at least, no judicial definition has been formulated which is wide enough to include purely aesthetic considerations.' Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427, 430, 86 A.L.R. 642."

The court in overruling the injunction granted to plaintiff to restrain the defendants from continuing to finish their house stated:

"These rulings conform to the great weight of authority. It follows that the zoning ordinance under consideration, in so far as it purports to prevent defendants from constructing on the Somerville lot a one-story home containing a floor area less than 2,000 square feet, on the sole basis of aesthetic standards, does not promote public health, safety, morals or the general welfare, and is therefore void. The entire record has been examined without finding any sufficient ground for the injunction granted. The judgment of the district court is reversed and the petition of the plaintiff and the petition of interveners dismissed at the costs of petitioners."

#### ZONING

(Hall v. Leonard, Supreme Court, Special Term, Bronx County, 21 N.Y.S. 2d 43)

The power to regulate the density of population is in derogation of the common law. Its inclusion among powers delegated to City Planning Commission may not be implied, and the charter provisions must be specifically followed and strictly construed.



The petitioner, Hall, brought a mandamus proceeding to compel the respondent, superintendent of buildings, to issue a permit authorizing the construction of an apartment house upon his land. The petitioner's plans were rejected upon the ground that his property, under the provisions of the Building Zone Resolution as amended at the present time, is located in a "G" area, restricted to single family dwellings. The amendatory resolution by which the area was changed from an "F" to a "G" zone was adopted by the City Planning Commission on October 11, 1938. The petitioner charged that the resolution is invalid for the reason that the Commission is not invested with power to re-zone upon the basis of density of population.

The court upheld the petitioner's claim and stated:

"Quite apart therefrom is the claim of lack of power. It is conceded that no provision of the New York City Charter, Administrative Code or other local law expressly confers upon any agency the power to rezone upon the basis of density of population. Respondent urges, however, that such power was conferred upon every city by the provisions of sec. 20, subd. 24, of the General City Law, and that nothing contained in the New York City Charter thereafter adopted repealed it, either expressly or by implication. True it is that the City of New York is enabled under the General City Law provisions to restrict the use of property to single family dwellings. That power, however, and the provisions conferring it are not self-executing, nor has it been delegated to any of the City's agencies. The failure to do so leads to the inescapable conclusion that this City has not elected to avail itself thereof. In the absence of appropriate legislative sanction the attempted regulation would be an unauthorized exercise of public dominion over private right. *Stevens v. Clarke*, 216 App.Div. 351, 215 N.Y.S. 190.

"Section 200 of the New York City Charter and Sections 200--1.0 and 200--2.0 of the Administrative Code are the only enactments referred to in this connection. It is significant, however, that those provisions invest the City Planning Commission with power to regulate and limit the height and bulk of buildings, the area of yards, courts and open spaces, the location of trades and industries and the use of buildings, all of which are likewise contained in the enabling provisions of the General City Law, but are wholly silent concerning the power to regulate density of population. That specific power has not been delegated to the Commission. Since it is in derogation of the common law, its inclusion may not be implied, and for the same reason the provisions of sec. 200 of the Charter must be specifically followed and strictly construed. *Matter of City of Buffalo*, 78 N.Y. 362. Thus the contentions of the respondent are wholly without merit, and, in the circumstances, offer no sufficient defense as a matter of law."

ADMINISTRATIVE ORDERS, REGULATIONS, and OPINIONS

THE PRESIDENT: By Executive Order filed August 14, authorized the Civil Service Commission to permit transfers during probation to national defense positions. See 5 Fed. Reg. 2857.

By Executive Order filed August 14, proscribed regulations pertaining to Budgetary Administration and financial reporting for the Government and its various agencies. See 5 Fed. Reg. 2849.

GOVERNMENT EMPLOYEES: Civil Service Commission: Published a notice of the condition of the apportionment as of August 15, 1940. See 5 Fed. Reg. 2899.

FARM CREDIT ADMINISTRATION: The Federal Land Bank of Omaha, by order filed August 19, amended its schedule of reamortization fees. See 5 Fed. Reg. 2882-3.

FARM SECURITY ADMINISTRATION: The Acting Administrator, by order filed August 29, published a schedule representing the equitable distribution among the several states and territories of the money authorized for the purposes of Title I for the fiscal year ending June 30, 1941. See 5 Fed. Reg. 3469-70.

The Acting Administrator, by order filed August 30, proscribed the value of the average farm of 30 acres or more in counties in which loans are to be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 3492-6.

FEDERAL HOME LOAN BANK BOARD: By resolution filed August 16, amended the Rules and Regulations for Federal Savings and Loan System with respect to lending on home properties beyond 50 miles from an association's home office. See 5 Fed. Reg. 2891.

Federal Savings and Loan Insurance Corporation: The Board of Trustees, by resolution filed August 16, amended its Rules and Regulations for Insurance of Accounts to accord with the amendment of the Rules and Regulations of the System adopted by the Federal Home Loan Bank Board on August 15 (5 Fed. Reg. 2891.) See 5 Fed. Reg. 2891.

RURAL ELECTRIFICATION ADMINISTRATION: The Administrator, by order filed August 9, allocated funds to a designated project in North Carolina. See 5 Fed. Reg. 2824.



The Administrator, by orders filed August 13, allocated funds to designated projects in Alabama, California, Florida, Georgia, Illinois, Iowa, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, and Wyoming. See 5 Fed. Reg. 2845.

The Administrator, by orders filed August 14, allocated funds to designated projects in Alabama, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Minnesota, North Carolina, Pennsylvania, and Tennessee. See 5 Fed. Reg. 2851-2.

The Administrator, by orders filed August 19, (1) allocated funds to designated projects in Georgia, Illinois, Indiana, Iowa, Maine, Minnesota, Missouri, New Jersey, New Mexico, Tennessee, Texas, Vermont, Virginia, and Wisconsin; and (2) amended a previous order allocating funds to a designated project in Alabama by changing the project designation. See 5 Fed. Reg. 2893.

The Administrator, by order filed August 22, allocated funds to designated projects in Arkansas, Colorado, Florida, Indiana, Iowa, Kansas, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and Wisconsin. See 5 Fed. Reg. 3167.

The Administrator, by order filed August 22, allocated funds for a designated project in Florida. See 5 Fed. Reg. 3947-8.

The Administrator, by order filed August 23, amended prior administrative orders with respect to allocations of funds. See 5 Fed. Reg. 3183.

The Administrator, by order filed August 24, allocated funds to a designated project in Georgia. See 5 Fed. Reg. 3185.

The Administrator, by order filed August 27, allocated funds to designated projects in Colorado, Indiana, Iowa, Kentucky, Minnesota, Ohio, Tennessee, Texas, and Wisconsin. See 5 Fed. Reg. 3395.

The Deputy Administrator, by order filed August 29, allocated funds to designated projects in Florida, Michigan, North Carolina, Ohio, Oregon, Pennsylvania, Texas, and Wisconsin. See 5 Fed. Reg. 3496.

## LEGAL COMMENT

LAW-CONSTITUTIONAL

"SOME ASPECTS OF JUDICIAL SELF-RESTRAINT" by F. D. G. Ribble, in 26 Va. L. R. (June 1940) 981-998.

This article is a discussion of what the author contends is a "substantial change in American Constitutional law which has taken place in the last few years. . . .centered around a will on the part of the judiciary to exercise self-restraint in dealing with legislative determinations." In this somewhat philosophical discussion it is pointed out that this judicial attitude not only enhances the freedom of Congress, in effect permitting the phrases of the Constitution to derive their application more from Congress and less from the courts, but also extends a similar liberty to state legislatures. The author makes a careful survey of extensive judicial censorship of congressional statutes which he asserts began at the close of the Civil War and reached its height during the 1935 term of the Supreme Court. He then carries his analysis through the era beginning with the 1936 Court term, which he declares represents the beginning of a new period during which the change of the court's attitude with respect to the censorship of congressional statutes "has been most striking." The author draws liberally upon Supreme Court cases to establish his thesis, and reaches the conclusion that in all probability the court will continue its exercising of judicial self-restraint although judicial review of acts of Congress is not at an end and will undoubtedly continue insofar as matters involving court jurisdiction and procedure and in cases involving civil liberties are concerned, should such arise. On the other hand, in controversies involving substantial matters of national policy, judicial review will be far less pronounced than in the years preceding the 1936 term of the Supreme Court. The effect of all of this, the author concludes, might well be that the states which find themselves in the minority must look more to the United States Senate as the guardian of their interests.



LAW-GENERAL

"STATUTORY DOUBTS AND LEGISLATIVE INTENTION" by Harry  
Willmer Jones in Columbia L. R. (June 1940) 957-974.

This article discusses the trend of the courts in determining the application of statutes by reference to their legislative history and their underlying objectives rather than by the mechanical and traditional canons or rules of construction. The author is of the opinion ". . . that one who essays an analysis of the judicial process in the application of statute law finds more conflict in legal literature than inconsistency in the judicial decisions." While statutes appear to be general propositions of law awaiting only simple deduction to arrive at a particular rule to control the decision in a given controversy, experience indicates that not only are tribunals at variance as to interpretations but even authors of legislative proposals are not always able to predict the conclusions which the courts will reach in the application of statute law. Thus in at least one case the majority holding of the Supreme Court was in direct conflict with an explicit assurance made by its author to Members of the House of Representatives. Interpretations of statutes are made even more difficult by unfortunate wording. Thus a statute reading "The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails", might be presumed, from its language alone, to include an aeroplane and subject a plane to a motor vehicle licensing act! These and related suggestions form the nucleus of an interesting case in favor of interpretation based upon a full understanding of legislative background.

PROPERTY-ADVERSE POSSESSION

"A PROBLEM IN TACKING" by Edward H. Warren in 88 U. of  
Pa. L. R. (June 1940) 897-914.

This article contains a thorough discussion of the fundamental question in the law of adverse possession based upon the following problem:

In 1915 A was the owner of Blackacre but in that year, no one being in actual possession, B took possession and continued in open possession, claiming to be the owner, until 1930 when he died. B had gone

through a ceremony of marriage with X, but she was already married. B and X had a son C. B believed that C would be his heir and for that reason made no will. On the death of B, D, his brother, was his heir. C had been residing on Blackacre with B and has continued in open possession at all times since B's death. In 1932, in the course of some litigation begun by X, D became convinced that X was not the widow of B, and, realizing that he was B's heir, delivered to C a deed transferring and releasing to him all his rights in Blackacre. C, from B's death to D's deed, claimed to be the owner of Blackacre as the heir of B, believing that he was his heir. After the delivery of D's deed, he claimed as the grantee of D. At all times he has claimed as the successor, immediate or mediate, of B. In 1939 A brought ejectment against C to recover the possession of Blackacre. He has not been under any disability. He contends that C cannot tack his adverse possession to that of B because from B's death to D's deed, C had no privity of estate with B. Should A win?

By statute it was provided: "No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or to make such entry first accrued, or within twenty years after he, or those from, by, or under whom he claims have been seised or possessed of the premises" (with no exception applicable to persons under a disability).

The author framed this problem so as to include in a discussion of its solution three fundamental questions in the law of adverse possession which he sets forth as being: (1) the consideration of the proper construction of the usual Statute of Limitations relating to land, and the effect of that construction upon all problems in tacking; (2) an examination of the extent to which the statute, although by its terms it only bars remedies, nevertheless operates as a statute for the acquisition of titles to land; and (3) a clarification of the differences between the medieval doctrine of disseisin and the modern doctrine of adverse possession.

There follows a very thorough consideration of the multiple related questions which arise in the course of a detailed analysis of these major divisions.

#### PROPERTY -TAXES

"FEDERAL ESTATE AND GIFT TAX: CONCEPT OF TRANSFER" by  
Henry J. Merry in 38 Mich. L. R. (May 1940) 1032-1044.

This article consists of a discussion of what the author describes as an almost continuous controversy as to the property inter-



ests which may and should be included in the basic measure of the Federal tax on the transfer of property at death. It is pointed out that the first of the "modern" federal death tax laws, enacted in 1916, "imposed upon the transfer of the net estate of every decedent" a tax measured essentially by the net value of the property interests at the time of death. This tax was upheld as an indirect tax or excise upon the privilege of transmitting property at death. While the fundamental nature of the tax has never been changed, the present law embodies numerous amendments with respect to the property interests which may and should be included in the gross estate and the author proceeds to discuss them after classifying such property interests as (1) interests passing by will, or the laws of succession and (2) interests of which the decedent for no valuable consideration made a transfer inter vivos related in some manner to his death. In the course of the article, the author cites numerous cases of interest in connection with the subject.

SELECTED REFERENCES

(The following list of current references, while by no means exhaustive, indicates the availability of material concerning legal problems regarding housing, and related documents.)

CONTRACTS

- Liability of the United States Government in Contract. E. E. Naylor, 14 Tulane Law Review. June, 1940.

MORTGAGES-Foreclosure Procedure

Reform of Mortgage Foreclosure Procedure - Possibilities Suggested by Honeyman v. Jacobs. Harold C. Vaughn, 88 Univ. of Pa. Law Review. June 1940.

TAXATION

- The Proposal to Tax Income From Governmental Securities. The case for taxation. William J. Shultz, 7 Law and Contemporary Problems, Spring, 1940.
- The Proposal to Tax Income From Governmental Securities. The case against taxation. Paul V. Betters, 7 Law and Contemporary Problems, Spring, 1940.
- Legal Problems In Taxing Income From Governmental Securities. Elmer E. Ronzer, 7 Law and Contemporary Problems, Spring, 1940.





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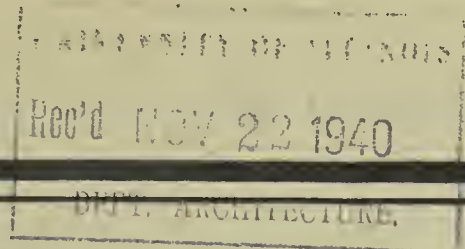
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# · HOUSING ·

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# LEGAL DIGEST

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Number 75

October 1940

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"...this is the first moratorium legislation in connection with the defense program, setting a possible precedent for future legislation which may involve larger numbers of our population. For this, if for no other reason, and because of the principles involved, the new legislation deserves careful attention..."

MORATORIUM FOR MILITARY MEN

(See LEGAL COMMENT, Page 25)

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
THE CENTRAL HOUSING COMMITTEE, WASHINGTON, D. C.

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## HOUSING LEGAL DIGEST

Issued monthly by the Sub-Committee on  
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The Editors of the HOUSING LEGAL DIGEST endeavor to present as completely and impartially as possible material relating to housing legal problems: but they assume no responsibility for opinions expressed herein and no inference may be drawn as to their agreement or disagreement with viewpoints expressed.

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DECISIONS

CONSTITUTIONAL LAW - HOUSING AUTHORITY LAW - LOCAL ORDINANCE

(City of Columbus, Ohio v. Columbus Metropolitan Housing Authority et al., Court of Common Pleas of Franklin County, Ohio, June 1940.)

Ordinances of the City of Columbus, providing for elimination of insanitary dwellings, are constitutional, and contracts made pursuant thereto are valid.

This action was instituted by the City of Columbus through its City Attorney at the request of a taxpayer and seeks to have declared null and void a certain ordinance of the City duly enacted by its Council, providing for elimination of unsafe and insanitary dwellings in the City of Columbus, and for cooperation with the Columbus Metropolitan Housing Authority in connection with the construction of low-rent housing projects, and the contract made pursuant thereto between the City and the Columbus Metropolitan Housing Authority.

The Court of Common Pleas of Franklin County, Ohio, decided this case on the ruling made by the Supreme Court of Ohio in the case State ex rel. Ellis v. Sherrill, 136 Oh. St. 328, 25 N. E. (2d) 844 (1940) as the facts in the two cases are similar and the same objections were raised as to the constitutionality of the Ohio Housing Authority Law. The Court also sustained the legality of the ordinance in question and the contract made pursuant thereto.

CONSTITUTIONAL LAW - HOUSING AUTHORITY LAW

(Higbee et al. v. Housing Authority of Jacksonville, Florida, et al., \_\_\_ Fla. 197 So. 479.)

The Act creating housing authorities to undertake slum clearance is not a "special law" but a general law.

This bill of complaint was filed by certain taxpayers of the City of Jacksonville and consists of some twenty-five paragraphs raising the question of the constitutionality of Chapter 17981 and Chapter 17983, Laws of Florida, Acts of 1937, and seeking an order or decree holding the aforesaid Acts void and unconstitutional and the issuance of a restraining order or injunction against the United States Housing Authority and the Housing Authority of the City of Jacksonville.



The Supreme Court of Florida sustained the constitutionality of Chapter 17981 and Chapter 17983, Laws of Florida, Acts of 1937, on the cases of Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145, Lott v. City of Orlando, 196 So. 313, and similar cases from other jurisdictions and affirmed the order dismissing the bill of complaint.

#### CONSTITUTIONAL LAW--TAXATION

(People v. Brooklyn Garden Apartments, Inc., Court of Appeals of New York, 28 N. E. (2d) 877)

The amendatory statute requiring limited dividend housing companies to pay charges of New York State Board of Housing for expenses of inspection, supervision, and auditing is not unconstitutional as "impairing obligation of contract," nor is it an illegal delegation of taxing power; nor is it invalid as a violation of the "due process" clause.

In 1926 the New York Legislature enacted the State Housing Law, Laws of 1926, Ch. 823 (since repealed L. 1939, c. 808, now covered by the Public Housing Law, Cons. Laws, Ch. 44-2), under which the law authorized the organization of limited dividend companies to construct and maintain low cost housing projects. To encourage the formation of such companies and the investment of funds therein special privileges were granted to such companies including the following: "Any public limited dividend housing company formed hereunder shall be exempt from the payment of any and all franchise, organization, income, mortgage recording and other taxes to the state and all fees to the state or its officer." Private limited dividend housing companies were granted a similar exemption. Until 1934 the expenses of supervising the construction and maintenance of housing projects by limited dividend companies, and the control of rentals and the auditing of accounts, was borne by the State. However, in 1933 (L. 1933, Ex. Sess. Ch. 802), the Legislature amended the housing law relating to the accounting feature of housing companies by providing that among the expenses of construction and operation of such companies there should be included such an amount as the State Housing Board might fix to reimburse it in whole or in part for its expenses of inspection, supervision and auditing, and the companies were directed to pay such amount to the Department of State. A charge of one-twentieth of one per cent of the original cost of each completed project was fixed.

Defendant, a private limited dividend company owed for such services the sum of \$622.87, for which the state brought this action to recover that amount. Defendant answered the suit on four separate affirmative defenses. The first defense was that the statute was not applicable to it because it was organized and had completed its buildings prior to 1933 when the statute was enacted. However, the court held that the law made no distinction and that it related to all limited dividend housing companies whenever organized. The court stated that "It merely amends provisions already ap-

plicable to the defendant by adding, for the future, a new item to its expenses. Cf. *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 A. St. Rep. 893, affirmed, 145 U. S. 125, 12 S. Ct. 880, 36 L. Ed. 666"

After disposing of the applicability as distinguished from the validity of the amendment, the court considered these contentions of defendant: (1) that the statute impairs the obligation of a contract, (2) that it deprives the defendant of property without due process of law and (3) that it illegally delegates legislative powers.

In concluding that none of defendants' defenses were sufficient in law, the court said:

"The defendant claims that the exemption from the payment of certain taxes and fees is violated by the amendment. Exemptions from taxation which have induced action in reliance thereon, as the defendant may well contend that the exemption here has done, may not be invalidated by subsequent legislation. *People ex rel. New York C. & H. R. R. Co. v. Mealey*, 224 N. Y. 187, 120 N. E. 155, affirmed, *People ex rel. Troy Union R. Co. v. Mealy*, 254 U. S. 47, 41 S. Ct. 17, 65 L. Ed. 123. Tax exemptions, however, are limitations of sovereignty and are strictly construed. *Hale v. State Board of Assessment and Review*, 302 U. S. 95, 58 S. Ct. 102, 82 L. Ed. 72; *J. W. Perry Co. v. City of Norfolk*, 220 U. S. 472, 31 S. Ct. 465, 55 L. Ed. 548. If ambiguity or uncertainty occurs, all doubt must be resolved against the exemption. *People ex rel. Mizpah Lodge, No. 518, I. O. O. F. v. Burke*, 228 N. Y. 245, 126 N. E. 703. The exemption upon which defendant relies is not a general exemption from all exactions on the part of the State but only from certain types of taxes and fees; franchise, organization, income, mortgage recording, are the types specifically mentioned, and then follows, 'and other taxes to the state and all fees to the state or its officers.' The payment here required to be made by the defendant must fall, if within the statute at all, within the general exemption. It is to be noted that the sum is payable to the Department of State for a specific purpose.\*\*\*Taking into consideration the kind of taxes which the statute specifies as indicating the kind of exactions from which the housing companies are to be exempt, we cannot say that the exemption in question is definite enough and sufficiently free from ambiguity to give protection against this direction for the payment of the Board's expenses. As the exemption is not to be construed as excluding the requirement for this payment, the constitutional guaranty is not infringed.

"The argument of the defendant that the amendment is invalid as a violation of the due process clause is based on the circumstance that no provision is made in the statute for a hearing in respect to the distribution of the Board's expense and the amount to be allocated



to any particular company. This argument was before the Supreme Court of the United States in *People ex rel. New York Electric Lines Co. v. Squire*, supra, where a public service corporation was required to pay a part of the expenses of a State Board for supervision and the claim of invalidity on the ground mentioned was rejected.

"The last contention of the defendant is that the amendment is invalid as an illegal delegation of taxing power. The requirement for payment is not imposed by the State Board, but by the Legislature itself. The only power that is delegated is the power to allocate particular expense. This is a delegation clearly permissible. *Matter of Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L.R.A., N.S., 713, 14 Ann. Cas. 606; *Matter of Mt. Hope Development Corp. v. James*, 258 N. Y. 510, 180 N. E. 252"

#### CONSTITUTIONAL LAW--TAXATION

(*Bridges Asphalt Co. v. Jacobsmeier et al.* \_\_\_ Mo. \_\_\_, 142 S. W. (2d) 641)

The "due process" clause of the constitution is not violated by the manner in which cost of improvement has been distributed if the expense has been apportioned as justly and fairly as is reasonable under the conditions, with special consideration of the benefits applicable to the parcels taxed, notwithstanding greater burdens are cast upon some. However, the constitutional guaranties are violated if the tax is distributed in grossly unequal portions under a plan which is arbitrary.

This suit was brought by plaintiff upon a special tax bill issued against the property of defendants for improvement of certain public streets. The plaintiff is the assignee of the bill. It appears that a taxing district was laid out and the cost of the improvement apportioned and after the work was completed the tax bills were issued. Plaintiff brought suit against defendants after their failure to pay, and recovered judgment which was affirmed on appeal.

"The chief question for consideration is whether the taxing district has been laid out in such a manner as to be an abuse of legislative power in that the distribution of the cost of the improvement is so unfair that the due process clauses of the United States and Missouri Constitution have been violated.\*\*\*"

There are bound to be certain inequalities and hardships in apportioning improvement taxes even under a plan which is reasonably fair and just. There is no violation of constitutional guaranties despite the fact greater burdens are cast upon some where the expense has been apportioned as justly and as fairly as is reasonable under the conditions and

with special consideration of the benefits applicable to the parcels taxed. Barber Asphalt Paving Co. v. Hayward, 248 Mo. 280, 154 S. W. 140. These constitutional guaranties are only violated where the tax is distributed in grossly unequal portions under a plan which is obviously arbitrary or a plain abuse. Houck v. Little River Drainage District, 239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266.

The court found that under all the circumstances the district as laid out apportioned the cost of the improvement fairly and reasonably.

#### EMINENT DOMAIN

(Housing Authority of New Orleans v. Polmer et al., \_\_\_\_ Fla. \_\_\_\_, 197 So. 247 (May 1940))

A reviewing court should not amend an award made by a jury of freeholders in a condemnation suit unless the verdict is based upon a palpable error, such as an error of calculation, or is so obviously inadequate or excessive as to be suggestive of favoritism.

This is a condemnation suit. The defendants are appealing from a judgment expropriating their property and allowing them \$3,000 for its value. The only question is whether the property was worth more than \$3,000.

The Supreme Court of Louisiana in affirming the judgment held that a reviewing court should not amend an award made by a jury of freeholders in a condemnation suit unless the verdict is based upon a palpable error, such as an error in calculation, or is so obviously inadequate or excessive as to be suggestive of favoritism.

#### HOMESTEAD RIGHTS

(Southern Pac. Milling Co. v. Milligan et al., \_\_\_\_ Cal. \_\_\_\_, 104 Pac. (2d) 655)

Property selected as a homestead and subject to an encumbrance must be sold subject to the encumbrance, and unless a bid at a sale is received exceeding the homestead exemption for the property subject to the encumbrance, no sale can be had.

Plaintiff instituted this action upon a contract for the direct payment of money and procured a writ of attachment to be issued, and the sheriff levied the same upon the real property of the defendants, which was at the time of the levy subject to a valid homestead.



The defendants, after the levy was made, gave notice to plaintiff of a motion for an order releasing the lien of the attachment and discharging said levy. The defendants were granted the motion prayed for and plaintiffs appealed.

The Constitution of California provides that "the legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families," and the California Code provides that "the homestead is exempt from execution or forced sale, except as in this title provided." The Code enumerates the exceptions allowed. It also provides for the procedure to be followed for the levy of an execution upon a homestead exceeding in value the amount of the homestead exemption which is the sum of \$5,000. Nothing is said in any of the sections of the Code respecting an attachment of property selected as a homestead, and the appellant contended that as there is no express provision of the law forbidding an attachment of property selected as a homestead that such a proceeding is within the law.

The Court, however, in overruling appellant's contention and sustaining the ruling of the Superior Court said:

"The right to attach property selected as a homestead was before this court in the case of *Marelli v. Keating*, 208 Cal. 528, 531, 282 P. 793, 794, and it was there held that: 'Property cannot be said to be exempt from, or not liable to, execution, where the execution levy is a necessary step to secure or preserve to the judgment creditor valuable rights, and, not being exempt from execution, it is, by the terms of section 541, Code of Civil Procedure, subject to attachment.' We consider this decision decisive of the question now before us.

"However, a holding that property subject to a valid homestead may be attached in a proper attachment proceeding is not decisive of this appeal. As we have seen, under certain sections of the Civil Code, an execution will lie against the excess value of a homestead when its value exceeds \$5,000. In this action, the defendants' motion was supported by an affidavit that this homestead property was of the value of \$5,000, and was subject to an encumbrance of \$3,500. No contrary affidavit was filed by the plaintiff and there is nothing before us to show that said property exceeded in value the maximum amount of the homestead exemption, even were it not subject to said encumbrance. The law is well settled that property selected as a homestead and subject to an encumbrance must be sold subject to the encumbrance, and unless a bid be received exceeding the homestead exemption for the property subject to the encumbrance, no sale can be had. Sec. 1255, Civ. Code; *Martin v. Hildebrand*, 190 Cal. 369, 373, 212 P. 618. With this situation before the trial court, we think it properly granted defendants' motion for the discharge of the levy of said attachment."

TORTS- LANDLORD AND TENANT - NEGLIGENCE

(Rosalie Sessa et al vs. HOLC, Municipal Court, City of New York, Borough of Manhattan. First District. September 1940)  
In New York a former owner who has been foreclosed but remained in the property in spite of the issuance of a writ of assistance is not a tenant, as that writ cannot be issued where the relation of landlord and tenant exists. Negligence of a former owner of a multiple dwelling in failing to make repairs held proximate cause of accident happening after foreclosure where former owner remained in property after foreclosure but not as tenant.

Mrs. Felicia Sessa and her three children sued HOLC for a total of \$2,000 as damages for personal injuries alleged to have been sustained by them on November 3, 1939, in a house owned by HOLC in New York. The house contained apartments for four families and the plaintiff resided in one of the apartments. The alleged injuries were claimed to have resulted from the falling of plaster from the ceiling of the apartment.

The testimony disclosed that Mrs. Sessa had owned and lived in the property long prior to the accident; that she had mortgaged it to HOLC and that HOLC had foreclosed its mortgage, bid in the property and acquired title a few months prior to the accident; that after HOLC acquired title Mrs. Sessa continued to reside in the property but had paid no rent to HOLC; and that two days prior to the accident an order had been issued by the Supreme Court of New York and recorded in the New York County Clerk's office granting HOLC a writ of assistance to evict Mrs. Sessa and deliver possession to HOLC. The evidence further disclosed that for several months prior to acquisition of title by HOLC (during which time Mrs. Sessa was the owner of the property and resided in it) a large crack existed in the ceiling, but that Mrs. Sessa had not had it repaired although the Multiple Dwelling Law and the mortgage to HOLC put the duty on her at that time to make necessary repairs.

Mrs. Sessa testified that after HOLC acquired title, but before the happening of the accident, she made arrangements with the property representative of HOLC to remain in the property at a rental of \$25.00 per month and that she requested him to repair the ceiling. This testimony, however, was denied and contradicted by the representative.

At the conclusion of the evidence HOLC contended that the plaintiffs were not tenants at the time of the accident, the issuance of the writ of assistance being res judicata of that question for the reason that under the law of New York a writ of assistance cannot be issued where the relation of landlord and tenant exists; that the pro-



imate cause of the accident was the failure of Mrs. Sessa to perform the duty imposed upon her by the mortgage and by the Multiple Dwelling Law, of repairing the ceiling while she was the owner of the property prior to acquisition of title by HOLC; and that by remaining in the property after the acquisition of title by HOLC, the plaintiffs assumed the danger of the cracked ceiling.

The trial court, after consideration, sustained the contentions of HOLC and decided the case in its favor.

LIMITATION OF ACTIONS - UNITED STATES - FARM CREDIT ADMINISTRATION

(United States v. Fontenot et al., District Court, W. D. Louisiana, 33 F. Supp. 629)

The Farm Credit Administration is an administrative body of the United States of America. It does not fall in the category of such corporations as the Home Owners' Loan Corporation and the Federal Housing Administration and therefore an action to recover the amount of a loan made by the Farm Credit Administration may be maintained in the name of the United States. It is not subject to either state statutes of limitations or to laches.

The plaintiff sought judgment against the main defendant, Fontenot, in the sum of \$125 plus interest, because of a loan made to defendant and which has remained unpaid. Plaintiff also made defendants Childs and Prudhomme Cotton Company, a partnership, who purchased cotton from Fontenot grown on land upon which was recorded a crop pledge to plaintiff, and which purchase was in violation of law. Childs, one of the partners, died before the filing of this suit and his widow and daughter were made parties defendant. The widow, and Prudhomme, made the following defenses: (1) the real party in interest as plaintiff is the "Governor, Farm Credit Administration," and is not the United States of America; (2) alternatively, the liability, if any, being one in tort, is barred and extinguished by the lapse of more than one year between the maturity of the note October 31, 1934, and the death of Childs, January 25, 1938; and two other defenses not necessary to this discussion.

The court found the following conclusion of law to be applicable to this case:

"The Farm Credit Administration is an administrative body of the United States of America; a separate unit of government. 12 U.S.C.A. sec. 636, U.S.C.A. Ch. 7, Exec. Order 6084. It does not fall in the category of such corporations as the Home Owners' Loan Corporation

and the Federal Housing Administration, which are regularly chartered, issue stock, and have a separate legal existence from the government of the United States. North Dakota-Montana Wheat Growers' Ass'n. v. United States, 8 Cir., 66 F. 2d 573, 92 A.L.R. 1484. Therefore, suit, as styled here, 'United States of America,' as plaintiff, is authorized and legal.

\* \* \* \* \*

"The governmental unit of the United States, plaintiff, herein, the Farm Credit Administration, is not subject to either state statutes of limitation or to laches. United States v. Thomas et al., 5 Cir., 107 F. 2d 765."

#### MORTGAGES - FORECLOSURE SALES

(Bertha Michalik v. Joe Pihulic et al, Circuit Court, Porter County, Indiana. September 1940.)

Person who bid in property at foreclosure sale and paid the purchase price to sheriff held not bound by later decree of which she had no notice setting aside the sale, particularly where decree setting sale aside failed to order repayment of purchase price.

On September 3, 1929, Joe Pihulic and wife executed a \$4,000 mortgage on property they owned in Lake County, Indiana, in favor of U. S. National Bank of Indiana Harbor. Later, Mary Toth and Winslow Van Horne, Trustees in a suit in Lake Circuit Court, became owners of the notes secured by the mortgage and on April 22, 1933, they instituted foreclosure suit in Lake Superior Court.

On October 26, 1933, by proper order, venue was changed to Porter County Circuit Court where the case became cause No. 10123. On June 7, 1934, judgment entered in Porter Circuit Court in favor of Mary Toth for \$3,906.50 and in favor of Winslow Van Horne for \$1,343.47 and costs and ordering a sale in foreclosure.

Mary Toth and Winslow Van Horne were represented by different attorneys. Mary Toth's attorney filed a written praecipe for issuance of order of sale, and an order of sale was issued to the Sheriff of Lake County on January 24, 1935. The Sheriff of Lake County advertised the property for sale and sold it on March 29, 1935, at the Court House door of Lake County without relief from valuation or appraisement laws of Indiana, as directed to do in the order of sale, and Bertha Michalik, being the highest bidder, bid it in for \$500. She paid the \$500 to the Sheriff and received from him a certificate of sale providing that if the property was not redeemed within a year she would be entitled to a deed of conveyance. The property was not redeemed and on July 11, 1936, the Sheriff executed a deed to her which she recorded



in the office of the recorder of Lake County on July 13, 1936. The Sheriff made a return of the sale, and it was recorded in the Execution Docket of the Clerk of the Porter Circuit Court.

On April 5, 1935, Dan Stirminski, who had been substituted as trustee in the place of Winslow Van Horne, filed a petition in the foreclosure proceeding in the Porter Circuit Court to set aside the Sheriff's sale to Bertha Michalik. This petition was set for hearing on May 1, 1935, and the Porter Circuit Court entered an order setting aside and vacating the Sheriff's sale and ordering the property to be resold. Bertha Michalik claims that this was without notice to her and without her knowledge, although the order setting aside the sale recited that notice was served on her. She claims that, since she had no notice or knowledge of the petition, the order entered thereon was a fraud on her.

The order setting aside the sale recited that the Sheriff of Lake County was notified of the petition to set aside the sale but Bertha Michalik claimed that no notice was in fact given to the Sheriff and that he was not notified of the fact that the sale was set aside. He never refunded the \$500 to Bertha Michalik but to the contrary executed a deed of the property to her. In fact the order setting aside the sale made no provision for repayment of the \$500 to Bertha Michalik, and her \$500 was never returned to her by anyone. Later an order was entered in the Porter Circuit Court canceling the foreclosure judgment and order of sale and dismissing the entire foreclosure suit. This also, Bertha Michalik claimed, was without notice to or knowledge by her.

After the entry of the order dismissing the foreclosure suit, the Home Owners' Loan Corporation took its mortgage from Joe Pihulic and wife in the sum of \$4,107.49, the proceeds being used by Pihulic to satisfy the indebtedness to Mary Toth and the substitute trustee, Dan Stirminski.

Some months after the Home Owners' Loan Corporation took its mortgage, Bertha Michalik instituted an independent suit in the Porter Circuit Court against Joe Pihulic and wife, Home Owners' Loan Corporation and some others who had been parties to the foreclosure suit. After alleging the facts as above stated, she prayed that a decree be entered vacating and setting aside the order of the court in the foreclosure suit setting aside and vacating the Sheriff's sale of the property to her, and that the decree also vacate and set aside the order of the court in the foreclosure suit canceling the foreclosure judgment rendered therein and dismissing said foreclosure suit. She further prayed that the mortgage lien of the Home Owners' Loan Corporation be held invalid and that she be adjudged to be the owner of the property free of the lien of the mortgage of the Home Owners' Loan Corporation.

The Home Owners' Loan Corporation contended that it knew nothing of any fraud in the setting aside of the sale to plaintiff, Ber-

tha Michalik, or in the dismissal of the foreclosure suit; that it was not its duty to ascertain whether or not the Sheriff of Lake County had returned plaintiff's \$500 to her; that it had a right to rely upon the apparent validity of the orders setting aside the sale to plaintiff and dismissing the suit and that the suit of plaintiff was an independent and direct action in the Porter Circuit Court to adjudge title to real property situated entirely in Lake County.

On final hearing the court decided in favor of plaintiff. It is believed that the decision is erroneous and both Pihulic and wife and Home Owners' Loan Corporation will perfect an appeal.

#### TAXATION

(Huddleston v. Vahlberg, \_\_\_\_ Okla. \_\_\_\_, 104 P. (2d) 431)

A delinquent taxpayer whose property is advertised in a tax resale proceeding may not, on behalf of himself and all others similarly situated, enjoin the entire resale for irregularity or defect in the resale proceeding, because only private and not public rights were involved, and the taxpayers not making themselves parties to the action might be willing to pay the tax.

Plaintiff brought this action against defendant, county treasurer, to enjoin the holding of the 1940 tax resale under the provisions of the Oklahoma statutes. The trial court denied a temporary injunction, and plaintiff appealed.

Plaintiff, a delinquent taxpayer whose property is included in the resale, sued in his own behalf, and in behalf of all other taxpayers similarly situated. He predicated his right to relief on the ground that the resale was not advertised as required by law and therefore void, and if permitted to proceed would (1) cloud the title of the taxpayers whose property is included in the sale, (2) result in an illegal expenditure of public funds which will increase the tax burden of himself and the class he represents, and (3) that the 1939 resale tax law is unconstitutional. While he alleged a tender of the amount of taxes due on his property included in the resale, he asked that the resale be enjoined as to all property included therein, and not as to his property only. It was not contended that the tax sale was illegal.

The court in affirming the decision of the trial court said:

"That one or more taxpayers may not for themselves and all others similarly situated maintain an action to restrain the collection of a tax is settled. Davenport, Court Treasurer, v. Snyder, 185 Okl. 160, 90 P. 2d 652; Stiles v. City of Guthrie, 3 Okla. 26, 41 P. 383. The underlying reason for the denial of the right of an affected



taxpayer to maintain such a class action is that only private rights are involved, and that taxpayers not making themselves parties to the action may be willing to pay the tax. The clouding of the title or sale of the property, of one taxpayer, is not a matter of concern to any other taxpayer, and in no way affects such other taxpayer's rights. There is no common or public interest. It therefore appears that plaintiff's first contention is without merit.

"As to plaintiff's second contention, that the resale will result in an illegal expenditure of public funds which will increase the tax burden of the class he represents, there is no evidence in the record to support this assertion. While there is a showing of an appropriation made by the board of county commissioners for extra salary and expense of resale and record work, sec. 7 of the 1939 law, 68 Okl. St. Ann. sec. 432f, requires the county treasurer to collect the expenses of the resale from the successful bidders, and the presumption is that he will perform that duty.

"Furthermore, the legality of the taxes not being questioned, plaintiff and the class he represents have an adequate remedy at law. They have only to pay the taxes due, which performance of their legal duty would render the resale unnecessary, and thus prevent the expenditure complained of. The purpose of the action is solely to prevent the sale of the advertised properties to enforce the collection of the taxes due. This may not be done. *Davenport v. Snyder*, supra; *Phelps v. Asplund*, 184 Okl. 310, 87 P. 2d 134.

"\*\*\*\*\*No right to enjoin the sale on the ground of illegal expenditure of public funds is shown.

"Plaintiff also contends that Art. 31, Ch. 66, S. L. 1939, by providing that property bought in by the county at original tax sales may be sold at resale for less than the amount of taxes due, violates sec. 53, Art. 5, of the Constitution, Okl. St. Ann.\*\*\*\*\*

\* \* \* \* \*

"From the above authorities it appears that the law in question here is not violative of the constitutional provision. It was enacted for the purpose of enabling the taxing authorities to collect delinquent taxes, not to remit or waive them. It authorized the sale of the taxpayer's property to the highest bidder to satisfy the lien, and specified a minimum amount for which the property must be sold, a provision for the benefit of the public and not for the benefit of the property owner. That the value of the property so sold would not liquidate all taxes due, and thus prevented the collection of the remainder, although a necessary and unavoidable result, is apparently, the basis of the plaintiff's contention. We fail to see where the sale of the taxpayer's property is a releasing or extinguishing of his liability to the detriment of the remaining taxpayers. The effect of

a valid tax sale under sec. 7 of the Statute is to vest in the purchaser an 'absolute and perfect title in fee simple' and to extinguish both the title of the former owner and the lien of the State."

#### TAXATION - EXEMPTIONS

(State ex rel. Burbridge v. St. John, \_\_\_ Fla. \_\_\_, 197 So. 549 August 1940)

The Supreme Court of Florida held that, under the provisions of Section 16, Article 16, of the Florida Constitution, exempting from taxation property held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes, if it was shown that property belonging to the Housing Authority of Jacksonville was held and used exclusively for enumerated purposes, or for any one or more of the purposes, such property was exempt from taxation; and upon a showing made to that effect by owner exemption should be allowed by tax assessor.

The Supreme Court of Florida, in an opinion supplementary to that rendered on June 28, 1940, tended to clear up some confusion resulting from its original opinion in regard to the exemption from taxation of property belonging to the Housing Authority of Jacksonville, Florida. The Court stated that the majority of the Court did hold that under the pleadings in the case, the property was not shown to be exempt under the organic provision. However, it did not necessarily follow that property belonging to the Housing Authority of Jacksonville may be exempt from taxation, nor does it follow that property owned by the Housing Authority of Jacksonville is not exempt from taxation.

The Court, in its opinion, stated:-

"Under the provisions of Section 16, Article 16, of the Constitution, if it be shown that any specific property belonging to the Housing Authority of Jacksonville, Florida, be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes, or for any one or more of such purposes, then that property is exempt from taxation, and upon a showing made to this effect by the owner the exemption should be allowed by the Assessor.

"The property owner is not a party to this suit. Therefore, the owner cannot be, by a judgment in this case, precluded from the exercise of its right to show that its property is exempt under the organic provisions, supra. Nor shall any judgment entered in this case appear to preclude the owner from the exercise of such legal right. Under the pleadings as presented here, it is not shown that the landowner is entitled to the exemption of the involved property



from taxation. Therefore, under the allegations in the pleadings, the relator is entitled to have judgment requiring the Tax Assessor to enter the assessment of the involved property on the tax books, unless the owner may show unto the Assessor that the property is exempt from taxation under the organic provisions, *supra*. This is necessary because the owner is not a party to this cause."

#### TORTS

(Dotty Scamboni v. HOLC, City Court, City of New York.  
September 1940.)

Visitor of tenant in property of HOLC held not entitled to recover damages for personal injuries sustained in fall down front steps of the property under facts proved at trial.

This was a suit against HOLC in which plaintiff sued for \$3,000 as damages for personal injuries sustained on June 27, 1939, in a fall down the front steps of a dwelling house at No. 327 East 124th St., New York City. HOLC had acquired the ownership of the house by the foreclosure of a mortgage. The house contained apartments for three families, and the front steps were used in common by the tenants of all three apartments. The front steps consisted of eleven stone steps, seven feet wide, with balustrades on both sides.

Plaintiff had gone to the property to visit her father and mother who were tenants in the top-floor apartment, and was attempting to descend the front steps when she tripped or slipped and fell down the steps. She testified that she fell as the result of a broken and chipped condition of the second step from the top and that she fell the balance of the way down the steps in spite of the fact that she had her right hand on the balustrade. On cross-examination she stated that the second step from the top was the step just below the top or landing of the stoop and that while she was on this top or landing step, she looked down and saw the defective condition of the second step, but nevertheless stepped on it and fell. Her father testified that the step had been broken and chipped for eight years and that prior to the accident he had notified the managing agent and property management representative of HOLC of the defective condition, in addition to two previous owners of the property, but that the defective condition had not been repaired.

The managing agent and the property management representative of HOLC both denied that plaintiff's father or anyone else had notified them of any alleged defect in the step, or had complained about its condition. They testified that no such condition as plaintiff described existed in the step at the time of the accident, although there was a slight "hollow" about one-fourth of an inch deep in the right side of the step resulting from wear and tear.

Under the above evidence the court rendered judgment in favor of HOLC.

#### ZONING

(Eastern Boulevard Corporation v. Willaredt et al., Supreme Court of New Jersey, 14 A (2d) 537)

The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited, and such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

This writ of certiorari brought up for review an ordinance adopted October 25, 1938, by the Board of Commissioners of the Town of West New York, restricting the area described therein the erection of apartment houses over two and one-half stories high and designed and used for more than three families. Prior to the adoption of the ordinance the area involved was a Residence Zone "B" area, wherein buildings of the character for which prosecutor sought a permit were allowed. In May, 1938, prosecutor's plans for a five-story apartment house were approved by the Board of Tenement House Supervision of the State of New Jersey. However, the Building Department of the Town of West New York refused to give prosecutor a building permit. In September 1938, the Supreme Court declared the ordinance invalid, and on October 25, 1938, the Board of Commissioners adopted an amendment to the ordinance which is the ordinance now under attack. In March 1939, prosecutor again made application to the defendant, Building Inspector, for a permit, which was denied on the ground that the proposed structure did not comply with the provisions of the zoning ordinance as amended.

The Court found that before this ordinance was adopted apartment houses had been built in the neighborhood, and that in fact it was better suited for this type of building than small homes. In declaring the ordinance void, the court said:

"It is obvious from the exhibits that the neighborhood is not a desirable one for the construction of small residences. There are practically none there. Apartment houses are all about. We fail to see any reasonable distinction between the easterly and westerly sides of the Boulevard with respect to the character of buildings to be permitted. During the first fifteen years that the zoning ordinance was in existence no such distinction was sought to be made.

"The statute adopted in pursuance of the constitutional amendment concerning zoning is R. S. 40:55-30 to 40:55-52, N.J.S.A. 40:55-30 to 40:55-52. Section 40:55-32 provides as follows: 'Pur-



poses of zoning; essential considerations. Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.'

"As was said in *Nectow v. Cambridge*, 277 U. S. 183, 48 S. Ct. 447, 448, 72 L. Ed. 842, 'The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.'

\* \* \* \* \*

"The purposes to be attained by zoning ordinances are clearly set forth in the statute. Which of the declared purposes will the contemplated use of its land by prosecutor violate?

"It appears that the contemplated use will not cause undue congestion in the streets; or present lessened security from fire, panic or other danger; or decrease adequate light or air. Nor does it appear that the prohibition of the proposed use will promote health, morals or the general welfare.

\* \* \* \* \*

"Upon the whole record, we conclude that the proposed uses are suitable to the district involved, and that such uses will not tend to any injury, inconvenience or annoyance to the community or any individual, and that the withholding of a permit, under the circumstances, is arbitrary and unjustified.

"The ordinance is declared to be void insofar as it prohibits the proposed use of prosecutor's property, and denies the issuance of a permit for such use. \*\*\* "

ADMINISTRATIVE ORDERS, REGULATIONS and OPINIONS

THE PRESIDENT: By Executive Order filed September 9, amended Schedule A and B of the Civil Service Rules to except certain designated positions from examination in the executive departments (as to Farm Credit Administration see page 3604) and allowing others to be filled by non-competitive examinations (as to United States Housing Authority see page 3605). See 5 Fed. Reg. 3601-3606.

The President, by Executive Order filed October 2, transferred certain designated lands of the United States in South Carolina from the Farm Security Administration to the Secretary of Agriculture for use, etc., in accordance with Titles III and IV of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 3898.

The President, by Executive Order filed October 1, prescribed regulations governing the payment of expenses incurred in connection with the death of certain civilian officers and employees of the United States. See 5 Fed. Reg. 3888-90.

GOVERNMENT EMPLOYEES: The President: By Executive Order filed September 5, prescribed that the Civil Service Commission establish a replacement list for certain employees who were involuntarily separated from the Federal service. See 5 Fed. Reg. 3589.

The President, by Executive Order filed September 24, prescribed Volumes One and Two of regulations governing the administration of the Selective Training and Service Act of 1940. See 5 Fed. Reg. 3779-3791.

Civil Service Commission: Published a notice of the condition of the apportionment as of August 31, 1940. See 5 Fed. Reg. 3625.

Published a notice of the condition of the apportionment at the close of business on September 30, 1940. See 5 Fed. Reg. 3909-10.

FARM CREDIT ADMINISTRATION: The Governor, by regulations filed September 3, authorized designated employees of the Emergency Crop and



Feed Loan Section to execute certain assignments of payments under section 8 of the Soil Conservation and Domestic Allotment Act. See 5 Fed. Reg. 3502.

The Cooperative Bank Commissioner, by regulation filed September 27, prescribed the farm products and farm supplies which might be accepted as security for loans at the interest rate provided in section 8a of the Agricultural Marketing Act, as amended. See 5 Fed. Reg. 3837.

The Federal Land Bank of Springfield, by regulation filed September 30, amended the schedule of fees with regard to abstract deposit fees. See 5 Fed. Reg. 3853.

The Federal Land Bank of St. Louis, by regulation filed September 30, amended its schedule of fees with regard to application fees on land bank and Land Bank Commissioner loans. See 5 Fed. Reg. 3871.

FARM SECURITY ADMINISTRATION: The Acting Secretary, by order filed September 17, designated certain additional counties in Michigan in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 3735.

The Acting Administrator, by order filed September 18, authorized the Director of the Resettlement Division to execute easements in certain cases. See 5 Fed. Reg. 3742.

FEDERAL HOME LOAN BANK BOARD: The FHLBB, by resolution filed September 11, amended the Rules and Regulations of the Federal Home Loan Bank System with respect to the adoption of budgets and the employment of compensation officers by the Federal Home Loan Banks. See 5 Fed. Reg. 3643-4.

The FHLBB, by resolution filed September 14, authorized the General Manager and General Counsel to grant partial releases, waivers, etc. See 5 Fed. Reg. 3668.

The FHLBB, by resolution filed September 14, authorized the General Manager with the advice of the General Counsel to grant written consents to making repairs and to removal of property, etc. See 5 Fed. Reg. 3669.

The FHLBB, by regulation filed October 1, authorized the General Manager to provide and maintain fire prevention service for pro-

perties securing debts owed the Home Owner's Loan Corporation. See 5 Fed. Reg. 3891.

Home Owners' Loan Corporation: The General Manager and General Counsel, by order filed September 5, amended the instructions regarding the placing of insurance. See 5 Fed. Reg. 3591.

The General Manager and General Counsel, by order filed September 10, amended the insurance requirements and prescribed a procedure therefor. See 5 Fed. Reg. 3633.

The General Manager and General Counsel, by order filed September 14, amended the procedure for partial releases, waivers, etc. See 5 Fed. Reg. 3669.

Amended the authorization with respect to partial releases and removals appearing at 5 Fed. Reg. 3669 (see above). See 5 Fed. Reg. 3746.

The General Manager and General Counsel, by order filed September 14, established a procedure for the granting of written consents to repair and to removal of property. See 5 Fed. Reg. 3670.

The General Manager and General Counsel, by orders filed October 1, prescribed regulations for (1) reconditioning in connection with sales; and (2) inspection and fire prevention service by the corporation. See 5 Fed. Reg. 3891.

The General Manager and General Counsel, by order filed October 2, amended certain regulations with respect to property management. See 5 Fed. Reg. 3899.

RURAL ELECTRIFICATION ADMINISTRATION: The Deputy Administrator, by order filed September 3, amended previous orders with respect to project designations. See 5 Fed. Reg. 3534.

The Deputy Administrator, by order filed September 4, allocated funds to designated projects in Arkansas, Missouri, Pennsylvania, South Carolina, and Virginia. See 5 Fed. Reg. 3564.



The Administrator, by order filed September 9, allocated funds to certain designated projects in Maine and Utah. See 5 Fed. Reg. 3617.

The Administrator, by orders filed September 16, (1) amended previous administrative orders with respect to the designation of projects therein; and (2) allocated funds to designated projects in Delaware, Florida, Iowa, Louisiana, Minnesota, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Utah, Wisconsin, and Wyoming. See 5 Fed. Reg. 3694.

The Administrator, by order filed September 20, allocated funds to designated projects in Georgia, Iowa, Minnesota, South Carolina, and Wisconsin. See 5 Fed. Reg. 3756.

The Administrator, by order filed September 23, allocated funds to designated projects in Georgia, Missouri, North Carolina, Oklahoma, Texas, and Virginia. See 5 Fed. Reg. 3814.

The Administrator, by order filed September 28, allocated funds to designated projects in Arkansas, Colorado, Maryland, and Minnesota. See 5 Fed. Reg. 3864.

The Administrator, by order filed October 1, allotted \$50,000,000 of the funds made available for the fiscal year and prescribed the apportionment to be made thereof among the several states. See 5 Fed. Reg. 3879.

The Administrator, by orders filed October 1, allocated funds to designated projects in Arkansas, Colorado, Florida, Georgia, Indiana, Illinois, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Ohio, North Carolina, Oklahoma, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming. See 5 Fed. Reg. 3892-3.

#### TAXATION - INTERNAL REVENUE - INCOME TAX

(I. T. 3411, Sept. 23, 1940, 9 U. S. Law Week 2192)

Limited Dividend housing corporation organized under Article IX of New York Public Housing Law, 1939, are not exempt from tax; nor is interest on securities issued by them exempt from tax.

Cases which arose under the New York State Housing Law of 1926 (L. 1926, Ch. 823) resulted in rulings that a private limited dividend housing corporation organized under that law was not exempt from Federal income tax either as an instrumentality of the State of New York engaged in an essential governmental function or as a civil league or organization not organized for profit but operated exclusively for the promotion

of social welfare under Section 103(8) of the Revenue Acts of 1928 and 1932 (*Amalgamated Housing Corp. v. Com'r; Amalgamated Dwellings, Inc. v. Com'r.*, 37 B.T.A. 817, *affd.* 108 F. 2d 1010).

The principle enunciated in the *Amalgamated* cases is applicable to limited housing corporations organized under Article IX of the Public Housing Law of New York, 1939 (L. 1939, Ch. 808). The differences between the declaration of policy set forth in the statutes do not result in a difference in the taxable status, for federal income tax purposes, of the corporations organized under the 1926 law and corporations organized under the 1939 law.

Nor does the provision in Section 190(2) of the 1939 law, declaring bonds, mortgages and income debenture certificates of all housing companies to be instrumentalities of the State, issued for public purposes, and together with interest therefrom to be exempt from taxation, require exemption from tax. The companies in the *Amalgamated* cases were incorporated as private limited dividend housing companies, the exemption provision for which under the 1926 law was similar to Section 190(2) of the 1939 law.



LEGAL COMMENT

EUROPEAN INSURANCE COMPANIES AND REAL ESTATE: With Particular Reference to Housing. By Corliss L. Parry. Published in The Journal of Land and Public Utility Economics (Northwestern University, August 1940).

In the above article Mr. Corliss L. Parry, evening lecturer on investments of insurance companies at Columbia University, treats a subject rarely discussed by American writers, although it merits attention due to the importance of these companies in the financial structure of practically all European nations.

These foreign insurance companies hold as their main investments real estate mortgages and directly owned property, and provide funds for financing these holdings, in much the same manner as do the American companies, (1) by mortgage loans on individual or group property up to one-half or two-thirds of appraised value; (2) by purchase of securities issued by governmental or other bodies such as mortgage banks and housing authorities; and (3) by out-right purchase, construction and operation of housing or other productive real estate.

While the mortgage holdings over the years show an aggregate but irregular expansion, yet the rate of expansion has been less than the total growth of assets. The result is that most of the portfolios of the companies, especially the German and British life insurance companies, show a decline in mortgage securities as they relate to the percentage of total assets.

In Germany, prior to the first World War, mortgage securities totaled over 80% of the holdings of private life insurance companies as a whole. The war and the inflation which followed practically stopped further growth and as a result these companies invested very little in the housing boom of the 1920's. Late in the 1920's, mortgage investments increased heavily, yet the former percentage was never regained before Hitler came into power.

With the rise of the Hitler regime, the purchase of governmental and industrial obligations became more prominent and mortgage holdings declined to less than 40% of assets compared with 50% in the pre-Hitler days and 80% prior to the first World War. Recent developments indicate that the percentage may be further decreased by action of the German Government.

In Great Britain mortgage loans have been favorably regarded by life insurance companies, though for 50 years there has been a steady decline in the relative importance of mortgage securities in portfolios of the companies. Competition with building societies, diversion of funds into government war obligations, changing economic structure, large enterprises financed through debentures rather than by direct mortgage loans, probably have been the contributing factors in this decline.

For the past 15 years, however, the mortgage holdings of the British companies have kept pace with the growth of total assets so that the ratio has been steadily maintained at 10% to 13% as compared with 20% prior to the World War and 40% in 1890.

Important as these loans are in the economic system of Great Britain, yet they are eclipsed by the phenomenal growth of the building societies which have increased their mortgage assets five times between the years 1925 and 1938 until at this time the insurance companies hold only between 1/4 and 1/3 of the mortgage assets held by the building societies.

In France mortgage loans have never occupied a place of importance in the portfolios of the life insurance companies when compared with the companies of other European countries. Mortgage securities constitute only about 5% of the assets of the life insurance and joint-stock land companies and about 10% in the mutual offices.

It can be seen that the mortgage investment policy as it relates to total assets varies widely in the three leading European countries. It is interesting to note that the policy of the American Companies which, through a period of 50 years, have held approximately 33-1/3% of their assets in mortgage securities, falls between the extremes of the German and French companies.

Due to lack of data, it is practically impossible to determine with accuracy the relative importance of debentures in contrast with direct mortgage securities held in the portfolios of the European companies, though it may be said that this type of investment is least important in the European company practice. In Sweden, however, obligations of mortgage banks and related institutions are said to approximate 14% of the life insurance companies' holdings. In Germany, it is claimed as a general proposition that companies should invest their funds in undertakings that best serve the need of the state and community, thereby encouraging the purchase of obligations of mortgage banks at the expense of direct mortgage loans. To what degree this has affected the purchase of debentures in Germany is not now known.



Outright ownership of real estate is another prominent asset in most of the European insurance companies. The strict limitations on corporate held real estate under the old mortmain restrictions have been liberalized and the corporations are universally permitted to own real estate needed for conduct of their business as well as real estate acquired by foreclosure, though in the latter case some statutes require disposition of the property within a limited period. As to the real estate acquired for investments alone, the rules vary in the different nations.

The French life insurance companies show the heaviest investments in real estate consisting largely of apartments and business properties located in urban areas. The home office properties of these companies figure modestly, and rural and foreclosed properties are negligible. In Great Britain the home and head offices are the largest single item of real estate holdings with some of the companies holding "flats", landed estates and business property in some degree of prominence. The German companies hold office properties and some foreclosed real estate.

Among the European national groups the French insurance companies are the most successful holders of real estate investments. Based on the balance sheet value they hold 12% of their assets in these investments, but eliminating the over-conservative valuation placed on these properties it is found that their holdings actually represent 18% of their assets. This assessed ratio of 18% is not far below the 1912 ratio of 19%. The ratio of British companies fell to 5% in 1930 but for the past ten years has shown a rise, while in Germany the present ratio is about 7% of the assets.

Mr. Parry, in his well written article, analyzes the individual experiences and operating results of a number of leading insurance companies in France, Italy and Britain. He shows that the French companies in recent years earned on their realty, net before the depreciation, about 4 1/4%, which is about 1/4% above their gross earnings on all assets and that certain British companies earned about 4 1/4% on the book value of their real estate. One company in Denmark shows even a greater earning of 4.8% on its realty.

Mr. Parry sums up his general conclusion on real estate investments by European insurance companies in the following statement:

"Viewed in entirety, the housing and other realty owned by European life insurance companies have proved successful investments. That is true not only as regards maintenance of capital values, but also as to general earning power, with some exceptions. Obviously, a very special kind of skill is necessary for successful real estate investment and operation, and that the larger European companies have

supplied. Perhaps the surest proof of their confidence in real estate is that they had continued to place new funds in that medium, until the outbreak of the war. Whether recent war-time developments abroad have irreparably altered the picture remains to be seen."

MORATORIUM FOR MILITARY MEN. Federal Home Loan Bank Review, Vol. 6, No. 12, September 1940, p. 402.

On August 27, the President signed the joint resolution commonly known as the "National Guard Act," which authorizes the Chief Executive to order into active military service members and units of "any or all reserve components of the Army of the United States" and retired personnel of the Regular Army (Public Resolution No. 96, 76th Congress). The joint resolution contains moratorium provisions which are of vital importance of mortgage-lending institutions and holders of residential real estate.

The extent to which day-to-day operations of savings and loan associations will be immediately affected by these measures is difficult to predict. The joint resolution includes a provision permitting the resignation or discharge of any member of a reserve component below the rank of captain who has a person or persons solely dependent on him for support and who has no means of support except the wages, salary, or other compensation for personal services which he earns. As the vast majority of home owners are heads of families, exemptions may be numerous for this group. However, this is the first moratorium legislation in connection with the defense program, setting a possible precedent for future legislation which may involve larger numbers of our population. For this if for no other reason, and because of the principles involved, the new legislation deserves careful attention by savings and loan executives.

#### REVIVAL OF A 1918 ACT.

The joint resolution extends to all persons called into service under its terms certain provisions of the Soldiers' and Sailors' Civil Relief Act of March 8, 1918. It protects these persons against proceedings caused by default upon mortgages, rental payments, or installment contracts. The joint resolution does not comprise protective measures as to life insurance premiums, real estate taxes and assessments, and rights to public lands--items included in the 1918 Act.

Generally, the provisions of the 1918 Act which are thus revived authorize, and in some circumstances require, the stay of legal proceedings for the duration of the service and three months thereafter. Specifically, the more relevant provisions of the now revived sections may be summarized as follows:



## FORECLOSURES

The Act applies to "obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him." In any court proceeding to enforce such obligation the court may either (a) stay the proceedings or (b) "make such other disposition of the case as may be equitable to conserve the interests of all parties." The court may, after hearing, take such action in its discretion and on its own motion, and where application is made by the person in military service or by some person on his behalf, the court is required to act, unless in its opinion the defendant's ability to comply with the terms of the obligation "is not materially affected by reason of his military service." Hence, not every borrower called into service is protected.

Provisions similar to those for court-action foreclosure are made for sales under power of sale or under judgment entered on warrant of attorney. The revived provisions stipulate that no such sale is to be valid if made during the period of military service or within three months thereafter unless upon order of sale previously granted by the court and a return thereto made and approved by the court.

## RENTAL PAYMENTS

The revived portions of the Act provide that during the period of military service no eviction or distress shall be made in respect to any premises for which the agreed rent does not exceed \$50 a month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of the person in military service, except upon leave of court. Here again, the court may in its discretion act on its own motion and is required to act on application, unless in its opinion the tenant's ability to pay the agreed rent is not materially affected by reason of his military service. The Act provides for a stay of proceedings for not longer than three months, or "such other order as may be just."

The revived provisions state that the Secretary of War or the Secretary of Navy, as the case may be, is empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person. It is to be noted, however, that the joint resolution of August 27 applies only to reserve components and retired personnel of the Army.

## INSTALLMENT CONTRACTS

The provisions relating to installment contracts are of importance to mortgage lenders because they apply to real estate sold "on contract." Where a deposit or installment of the purchase price has been received, the revived provisions of the Act prohibit the exercise of any right or option under the contract to rescind or terminate the contract or to repossess the property for non-payment of any installment which falls due during the period of military service, except by court action. The Act provides that in such an action the court may order the return of prior installments or deposits, or any part thereof, as a condition of termination of the contract or resumption of possession, or may order a stay of proceedings or "make such other disposition of the case as may be equitable to conserve the interests of all parties." Here again, the court may act on its own initiative, and must act on application, unless in its opinion the ability of the defendant to comply with the contract is not materially affected by reason of his military service.

## BILLS IN PROCESS

At the time this issue went to press, the Senate version of the Conscription Bill (S. 4164), providing for a system of selective compulsory training and service, had been passed by the Senate with moratorium provisions similar to those discussed but applicable to all persons inducted into the land or naval forces under its terms. Also, the House Committee on Military Affairs had reported favorably the House version of this proposed legislation (H. R. 10132) with a committee amendment including moratorium provisions similar to those of S. 4164.

Either of these bills would affect a much larger number of persons than the National Guard Act. The President has already called 60,000 members of the National Guard, drawn from 26 states, for active service effective September 16.

In addition, there are pending two separate and more inclusive moratorium bills for persons in military service. These bills are S. 4270 and H. R. 10338. Both include moratoria not only on mortgage foreclosures, rental payments where the agreed rent does not exceed \$80 a month, and installment contracts, but also on real estate taxes and assessments and on premiums on life insurance policies not exceeding the face amount of \$5,000, with provisions by which the Government would later pay the balance due on such premiums but would have a lien on the policies for its reimbursement.

Other bills now pending provide for the payment by the Government of the installments due on certain classes of mortgages where the mortgagor is in service or training in or as a part of the military or



naval forces during any national emergency for which he volunteers or is drafted through selective methods. The mortgagor would be required to reimburse the Government for these payments. One of these bills (H. R. 10294) would apply to any "home mortgage;" two others (S. 4198 and H. R. 10280) would be applicable only to mortgages insured under Section 203 of the National Housing Act.

See "CIVIL RELIEF BENEFITS FOR DRAFTED MEN"  
--9 U. S. Law Week 2186.

DEFENSE HOUSING NOW. By C. F. Palmer, Housing Coordinator of the National Defense Advisory Commission. Address delivered before Central Housing Committee, Washington, D. C., October 5, 1940.

Seventy-six days ago the Coordination of Defense Housing began. Through your Central Housing Committee, of which Lowell Mellett is the capable and genial Chairman, you, the Federal executives who deal with housing, unanimously decided such coordination necessary for total defense against the threat of war.

The office of the Coordinator was made part of the National Defense Commission and the task of that Commission is to see that the Army and Navy get what they need, when they need it, with no ifs, ands, or buts.

We must see that not a single rivet in a destroyer is delayed for lack of a skilled workman because he couldn't find a place to live. We must see that the production of airplanes does not slow down because decent housing can't be had when needed.

It was with this spirit we all sat around a table in the hot weeks of July to advise regarding ways and means to use the facilities of the established housing agencies.

We knew our defense must be total defense. We had just watched the fall of France, not because she lacked men and materials, but because the social and economic order in France was not sound enough to inspire total defense.

Defense housing is part of the total defense of any nation. Speed is paramount in doing the job, but the speed required is not incompatible with the principles of sound community development. It is as easy to build a house quickly that comes up to adequate standards as to build one that repeats the old mistakes of bad planning. The defense

housing program can create neighborhoods which contribute to decent living. Thus we protect our democracy against the internal rot which ruined France. The loyal families of America whose workers are on the industrial firing line, sweating day and night, transforming paper plans into the tangible staff of which defense is made, have a right to expect homes, not just shelters.

Seventy-six days ago, when we first sat down together, there was no coordinated program; there was no money. By working together, we now have both.

### PROGRAM

Here is the program. It is based on the premise that the duty of the Coordinator is to see that sufficient housing - private, preferably, but, if not, then public - is made available to meet emergency needs with such dispatch that National Defense does not suffer. This program gradually evolved through individual and collective recommendations from the official advisors of the various housing agencies, the Army, and the Navy.

Our job is not easy, because, while all concur in our primary objective, there are so many ways to reach it we cannot always agree on the best route to take. However, we are now beginning to see that each of us has an important part to play in any coordinated housing program for national defense. The pattern cannot remain a fixed one.

The program, in the main, includes housing for families of enlisted personnel; for families of civilian employees in the Army and Navy; for such single civilian employees of the Army and Navy as have to be provided with housing; for single employees and for families of employees in privately-operated industries engaged in the production of defense materials.

This program has five general categories; (1) Private Housing, (2) the RFC equity purchasing plan, (3) Federal Works Agency, (4) USHA, and (5) the Armed Forces.

1. Private Housing. In general, to private industry is assigned the major portion of demand which can pay commercial rents or corresponding purchase payments where the need is considered to be a permanent one. In most of the areas this "private portion is being taken up at various rates by building and remodelling dwellings. FHA Mortgage Insurance and Building and Loans Associations, often members of the Home Loan Bank Board system, are very important factors in this field. We are establishing a current inventory to see how completely this market is being supplied. Every step in the program is designed to forestall any definite influence which would prevent private industry from fulfilling its obligations and making the most of its opportunity.



Private capital is being encouraged to act by leaving to it the entire field of housing for sale. Governmental operations are now confined to rental projects. In most cases, the rent per month will be higher than the installment under the monthly purchase plan.

Furthermore, we are guarding against over-production. As private industry expands its housing operations, it is intended that the Government's correspondingly will contract.

An example of how to prevent overproduction is the use being made of a summer resort within commuting distance of an area of great defense activity. Here the owners of the summer hotels and cottages have been persuaded to keep open all winter.

2. RFC Equity Purchase Plan: The allocation of \$10,000,000 to RFC Mortgage Company, provides equity capital so that work on housing projects can be commenced immediately in areas where the need to house workers engaged in national defense activities is acute and is not otherwise being met.

These funds can be supplemented by \$40,000,000 through the proceeds of mortgages on such projects insured by FHA under Section 207 of the National Housing Act, making a total of \$50,000,000 immediately available. This plan is designed to produce houses more quickly than can otherwise be done with subsequent resale of equities as rapidly as possible.

Land contracts and options have already been signed in some instances. Active negotiations are proceeding in 14 areas on both coasts at the present time where there is a reasonable likelihood that these rental developments can be absorbed permanently into the community patterns.

3. Federal Works Agency. The fourth main category will take care of temporary need which none of the other measures are prepared to provide, and which requires direct construction by some Federal agency other than the Army or Navy. The Lanham Bill is aimed at this category of defense housing need, and places administrative responsibility in the Administrator of the FWA. Farm Security may come into play and make available its splendid experience and facilities where housing has future rural use. W. P. A. will also be available for construction of utilities.

4. USHA-Local Authorities. In the case of defense housing needed for families of low income, unable to pay commercial rents, and particularly for families of enlisted personnel and low-income industrial workers, where competent local housing authorities exist and where funds are available, it is proposed to make use of such local authorities and of the United States Housing Authority.

Thus the type of housing best adapted becomes a part of the orderly growth of the community because it is developed and operated by local people who know the needs and desires of the families they serve.

5. Army and Navy. In general, the best-defined needs for defense housing in connection with specific defense activities are those reported by the Navy and the Army.

It is understood that the Navy will itself build and manage most of its defense housing projects, with assistance from local housing authorities in some cases, and with recognition of the principles above outlined in all cases. The same is true of the Army, except the Army will use Federal agencies for construction more extensively than the Navy.

So much for the program.

While evolved to encourage private enterprise and give to it the larger part of the job to do, it includes an important part for every Federal Housing agency to play.

And remember the public is ready with many valuable and unselfish suggestions.

A truly intelligent contribution to our ends - and the more of a contribution because it has been volunteered - is this analytical study which we see in the hall here today, which has been made by these young architects, men and women, Associates of the Washington Chapter of the American Institute of Architects.

They have given generously of their scant time to make these studies - not merely studies of architectural planning - but searching comparisons of our other World War experience, etc., then and now, social and economic complications . . .

Of this work we hope to make good use and on behalf of all of us in defense housing, I thank these volunteers for this very real service they have rendered.

#### FINANCING

Now how about the money?

Legislation and cash are needed for such a program. We now have both. The first Ten Million came from the President's emergency funds and went to the RFC Mortgage Company with which to buy equities. As a result, definite progress is already being made in 14 areas as previously explained.



Next \$100,000,000 was secured through an amendment to the Defense Bill. Here is how \$95,340,000 of that money is already being used.

Underway are 12,640-dwelling unit program for the Navy; plus 700 units for Maritime Commission, and a 13,900-dwelling unit program for the Army. These will provide housing for low-income civilian and enlisted families connected with naval and military establishments. A large proportion of this need is "temporary" and none of it in the field either of private enterprise or RFC.

Thus, these three agencies, with various assistance from Federal and local agencies, are moving rapidly into the construction of 27,240 dwelling units of defense housing in 110 of the most urgent and critical situations; units which private enterprise could not produce because of the special or temporary nature.

In addition to the above we have the Lanham Bill, our most comprehensive piece of Legislation. It meets the needs admirably and provides \$150,000,000.

To sum up, after we repay the \$10,000,000 which the President advanced to RFC Mortgage Company from his emergency fund, we have left \$290,000,000 with which to do what? With which to attack the reported need of 128,791 units in 216 cities of 39 states and 8 possessions.

From facts before us we believe the need will run 160,000 to 200,000 units. If the latter, at say an average of \$3,500, the total cost will be \$700,000,000. We have \$290,000,000. Consequently, it is self-evident how heavily we must lean on private enterprise.

As the program swings into action, so also does coordination. Instead of five site negotiators for as many agencies bidding against each other for land in a given area, purchase is channelled through one, much to the delight of all involved except the avaricious seller, if such there be.

Promiscuous purchase of materials is also on the way out. Centralized buying for thousands of units is now beginning. One dollar per dwelling unit saved with 27,340 now in the works means \$27,340 more in Uncle Sam's purse from this first construction program alone, much to the delight of all involved except the avaricious seller, if such there be.

We must watch every penny. We must make it do its work for the nation. Our aim is to follow normal channels but defense housing must and will be produced.

Our total defense program requires unity. We "cannot concenter all in self" either individually or by agencies. The strength of our country comes from unity. In the 1860's we nearly came to grief through fighting each other to preserve it. If unity meant anything then, just think what it means now.

What we have here in democracy was won for us by our forebearers through willing toil, sweat and sacrifice. We must be prepared to protect this heritage perhaps in the same way.

However, we must realize what we are up against. In the world today men and nations mislead by brute force or by a burning fanaticism, the like of which has rarely been seen, are ready to throw away their lives.

We can cope with this only if we recapture the spirit of those who built our nation, those who chose the sacrifice for liberty. That is the way we have chosen.

We must work together; we must sacrifice together. Nothing less will do. The proof of such oft repeated appeals by the President is continually reaffirmed.

We are drafted for service as definitely as any soldiers in any cantonments. In defense, housing is vital. Working shoulder to shoulder we can and will do the job which our President has assigned us.











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# · HOUSING · LEGAL DIGEST

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Number 76

November 1940

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"The jobs and the homes of most of the people in our country constitute a part of their stake in the Nation. As long as they know that their government is sympathetically working to protect their jobs and to better their homes, we can be confident that, if the need arises, the people themselves will wholeheartedly join in the defense of their homes and the defense of their democracy. And so I regard these housing projects everywhere as a part of the program of defense."

(The President ... October 11, 1940.)

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
CENTRAL HOUSING COMMITTEE, WASHINGTON, D. C.

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## HOUSING LEGAL DIGEST

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The Editors of the HOUSING LEGAL DIGEST endeavor to present as completely and impartially as possible material relating to housing legal problems: but they assume no responsibility for opinions expressed herein and no inference may be drawn as to their agreement or disagreement with viewpoints expressed.

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DECISIONS

AGENCY

(HOLC v. Mac Thornburgh et ux, Supreme Court of Oklahoma. Decided October 15, 1940.)

A person dealing with agent whom he knows does not have authority to bind his principal cannot rely on statement of agent that he has authority. Such statement does not make out a case of apparent authority.

The plaintiff, HOLC, foreclosed its mortgage by court proceeding and bid in the property at less than the full amount of the judgment, thus leaving a deficiency judgment in its favor, and the sale was confirmed. HOLC subsequently caused an alias execution to be issued on the deficiency judgment and levied on other property of the defendants. The defendants moved to recall the alias execution and at the hearing the trial court sustained the motion on the ground that the deficiency judgment had been satisfied and settled. The plaintiff, HOLC, appealed to the Supreme Court of Oklahoma.

The trial court's conclusion that the deficiency judgment had been satisfied was based on an alleged oral agreement between one of the defendants and a field agent of HOLC arising out of a sidewalk conversation between them after the sale had been confirmed. The defendants contended that the field agent agreed to satisfy the deficiency judgment in consideration of the promise (which was kept) of the defendant not to appeal from an order of a United States District Court denying his petition to be declared a bankrupt in a proceeding under the Frazier-Lemke Act. The Supreme Court of Oklahoma upon reviewing the evidence found that the defendants knew that the field agent of HOLC did not have authority to agree to satisfy the deficiency judgment or to satisfy it, although he said that he did. The Court then disposed of the case as follows:

"We have not ignored defendant's testimony that the agent told him that he, the agent, had telephoned the regional office and that the authorities there had told him, the agent, that the plan was satisfactory or words to that effect. The undisputed testimony is that no request for a release was ever submitted to the regional office, and no approval was ever had from that office. Therefore we have this situation (a) the agent does not have the authority to agree to release



the judgment for his principal; (b) the third party knows of such lack of authority; (c) the agent tells the third party that the principal, nevertheless, has empowered him to make the agreement in the particular case; (d) no such empowering had in fact occurred. Is the principal bound? By such authorities as we have been able to find, and by the operation of familiar principles of agency, we are guided to answer that question in the negative, although an argument to the contrary could be made.

"The defendant could make no agreement with the plaintiff, under the circumstances, except through the medium of the plaintiff's agent, who is the only one with whom he talked. Therefore, if the principal is bound, it is bound through an act of its agent. We have already ruled out the existence of apparent authority, due to defendant's knowledge that the agent did not have actual authority. If we should now replace that apparent authority by the mere statement of the agent (now known to have been false) that he had been given the power, we would run contrary to the well established rule announced in many of our decisions, including *McDonald v. Strawn*, 78 Okla. 271, 190 P. 558, that the enlargement of an alleged agent's authority cannot be established by declarations of the agent made out of court. Agency cannot be proved by the declarations of the reputed agent. *Whitcomb v. Oiler*, 41 Okla. 331, 137 P. 709; *Schaff v. Coyle*, 121 Okla. 228, 249 P. 947. And the same prohibition applies to proof of the extent of the authority as applies to proof of agency itself. *McDonald v. Strawn*, *supra*; *Mabee v. McWaters*, 151 Okla. 10.

"A further thought on the question is this: When an agent by express words represents to a third person that the principal has consented and has therefore given him authority to close the deal, he is saying no more than what he would imply or infer anyway by the mere offer to transact for his principal, unaccompanied by said words, for of course an offer or an agreement by one representing himself to be an agent includes his accompanying representation of authority. Else he would not hold himself out as agent.

"In *Joseph v. Struller*, 25 Misc. 173, 54 N. Y. S. 162, the facts in legal significance were the same as here. An agent whose authority to act was restricted within limited and circumscribed powers, as here, and who was therefore a special agent (*Story on Agency*, Sec. 17; 1 *Amer. & Eng. Enc. Law* 985; *Great American Casualty Co. v. Eichelberger* (Tex) 37 S. W. 2d 1050) was negotiating on behalf of his principal concerning the purchase of certain Mexican dollars. The third persons knew of the limitations of his authority. In contemplation of an exercise of excess authority he went to the telephone, in their presence, and talked, and then hung up the receiver and turned about and said that the proposition was all right, or accepted. The court held that since the third persons already knew of the limitations of the agent the actual representations of the agent alone, unaided by

other circumstances, were insufficient to bind the principal. The court said in the fifth syllabus:

"One who deals with a person known to be a special agent cannot rely on the agent's claim of authority to act in a transaction merely because he went to the telephone, and conferred, as defendant supposed, with his principal in regard to closing the transaction, and then agreed to the terms of the contract."

"2 C. J. S. 1197 and 1198, citing many cases as authority, summarized the standard of care required of a person who has been put on notice of the limitations of an agent's authority. Speaking on the subject of persons from whom the third party should derive the true information, it is said therein:

"The inquiry, in order to discharge the duty and relieve the third person from the consequences of a failure to fulfill it, should be made and the extent and character of the authority ascertained, from the principal or some other person interested, in the principal's behalf, in the disclosure of the truth with reference to the matter; mere inquiry of the agent or assurances by him will not avail, for the agent's statement or conduct show only the latter's assumption of authority, which does not excuse the third person from seeking information from proper sources, any more than does his presuming an authority in the agent to deal in a particular manner or as to particular matters. In order to be entitled to the protection afforded by his satisfying the requirement of inquiry, he must trace the authority to its source, or must, failing that, know of acts or declarations of the principal demonstration of the authority."

"We see no essential difference between this case and the situation existing in Hartford Fire Ins. Co. v. McAvoy, 177 Okla. 60, 57 Pac. 2d 242, where an insurance agent advised persons seeking a fire insurance policy that he could not write such a policy but would telephone the insurer, and then did telephone the insurer, in which case it was held that the third parties could not rely upon his representations as to what additional authority had been given him."

"According to proper analysis of the case, as we see it, and in line with what appears to be the prevailing rule, we see no alternative but to reverse this judgment and direct that judgment be entered for the plaintiff. Accordingly, it is so ordered."



BANKRUPTCY - PRIORITY OF CLAIMS

(U. S. D. C., E. Pa. In re Goldstein, Sept. 9, 1940, 9 LW 2227)

Landlord in Pennsylvania has prior claim for rent, accruing within three months of bankruptcy, on proceeds of sale of tenant's property, removed from premises by tenant's assignee for benefit of creditors and subsequently sold by receiver in bankruptcy, although lien was not acquired by distraint levied before removal of property and notwithstanding such removal prior to bankruptcy.

The claim for priority is based on Section 64(a)(5) of the Bankruptcy Act (11 U.S.C. 104(a)), under which a landlord, entitled to priority under the applicable state law, is granted priority for rent "which accrued within three months before the date of bankruptcy."

The assignment was made Oct. 4, 1939, and on the same day the assignee removed all merchandise and assets of the assignor except the fixtures, which were of little value. On October 6, an involuntary petition in bankruptcy was filed. The bankruptcy receiver took possession of the property removed by the assignee and sold it under court order, thereby creating the fund in dispute.

The referee denied priority to the landlord's claim for rent accruing within three months of bankruptcy on the ground that no lien had been acquired by distraint as required under Pennsylvania law and on the further ground that the property was not on the premises when bankruptcy proceedings commenced. The order of the referee is reversed.

"The [Pennsylvania] decisions are unanimous to the effect that, in order that the landlord's claim be entitled to priority from the proceeds of the sale of the chattels, \*\*\* it is not necessary that the landlord should have distrained upon the goods. \*\*\* If the goods were upon the demised premises liable to the distress of the landlord at the \*\*\* [time of the assignment], the Pennsylvania statutes [Act of July 17, 1919, P. L. 1029, Sec. 1, 39 P.S., Sec. 96] charge the proceeds with prior payment of the landlord's claim for rent \*\*\* Nor does the fact that the chattels here were removed from the premises by the assignee prior to the institution of the bankruptcy proceedings alter this result."

COVENANTS IN DEEDS

(Cevasco v. Westwood Homes, Inc., Court of Chancery of New Jersey, 15 A. (2d) 140).

A covenant restricting the erection of buildings costing less than a certain sum will not be enforced by injunction, where status of the neighborhood has become such that the erection of buildings costing said minimum sum is not feasible and the covenant is no longer beneficial.

This was a bill brought to restrain the defendant from erecting a building to cost less than \$6500 by reason of a restrictive covenant in like deeds, by which complainant and defendant acquired their lots from a common grantor. The proposed erection by defendant would be a violation of the letter of the covenant. However, defendant showed the facts to be that most of the houses in the neighborhood had cost less than \$6500. In fact, it appeared that there never was any complete neighborhood plan put into effect to cover the entire tract in question. It further appeared that the type of construction required in future building prevented the erection of houses costing as much as \$6500. The court said that "To enforce the covenant by injunction under these circumstances would, therefore, be inequitable. Where circumstances have changed and enforcement of a restrictive covenant would impose an oppressive burden without any substantial benefit, the covenant must undergo modifications."

The court further said, in denying the injunction sought by plaintiff:

"In *Laverack v. Allen*, 130 A. 615, 616, 2 N. J. Misc. 637, the court says: 'To constitute a neighborhood scheme of restriction, the scheme must be universal; that is, the restrictions must apply to all lots of like character brought within the scheme. Unless it be universal, it cannot be reciprocal. If it be not reciprocal, then it must as a neighborhood scheme, fall.' Citing *Scull v. Eilenberg*, 94 N. J. Eq. 759, 121 A. 788.

"In *Sanford v. Keer*, 80 N.J.Eq. 240, 83 A. 225, 226, 40 L.R.A., N.S., 1090, the court says: 'In a general or neighborhood scheme, the burden follows the benefit; and where, by reason of abandonment, acquiesced-in violation, change of character of the neighborhood, or other sufficient cause, the benefit to the property owners affected by the scheme is totally or partially destroyed or impaired, the accompanying burden undergoes a corresponding modification.'

"Where, by reason of the change of character of a neighborhood, the restrictive covenant would be a burden upon the restricted property without conferring any benefit upon the property of the covenantee, equity will refuse relief. *Laverack v. Allen*, supra; *Page v. Murray*, 46 N.J.Eq. 325, 19 A. 11."



HOMESTEAD RIGHTS - MECHANICS' LIENS

(Home Lumber Co. v. Heckel et al., \_\_\_ S.D. \_\_\_, 293 N.W. 549).

The legislature has power, under constitutional provisions, to define the homestead and specify the property or limit the amount in value that shall be exempt, but there is no power to differentiate between debts by providing that the homestead, as defined, or property declared exempt shall be subject to certain debts but not to others.

The defendants owned some land upon which they decided to build a house and make the place their home. The plaintiff constructed a house for defendants which was immediately occupied as their home. Following the construction of the home and within the time allowed by law, the plaintiff filed a mechanic's lien against the premises wherein it sought a right to foreclose this purported lien.

The court found that the premises in question constituted the homestead of the defendants and that this was communicated to the plaintiff at the time the materials were furnished. The question, therefore, is whether the mechanic's lien as filed will attach to the homestead. The trial court held adversely to the plaintiff and the decision was affirmed by the South Dakota Supreme Court, which stated:

" \*\*\* Prior to the amendment of Section 455, R. C. 1919, by the enactment of Chapter 142, Laws of 1927, such lien did not attach to the homestead. Fallihee v. Whittmayer, 9 S. D. 479, 70 N. W. 642; Robert Burns Lumber Co. v. Peterson, 48 S. D. 92, 202 N. W. 387. Chapter 142, Laws of 1927, (Now SDC 51.-1707) provides, in part, 'The homestead may be sold \*\*\* for the agreed or reasonable costs of the material furnished or labor performed in the original erection and construction of buildings thereon.' Respondent challenges the constitutionality of this law. Section 4, Article 21, Constitution of South Dakota, provides: 'The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws.'

"Construing this constitutional provision together with Section 18, Article 6, this court in the case of O'Leary v. Croghan, 42 S. D. 210, 173 N. W. 844, 6 A.L.R. 1134, held, insofar as applicable to the facts now before us, that the legislature has power under these constitutional provisions to define the homestead and specify the property or limit the amount in value that shall be exempt; but, having specified the property and limited the amount, the power of the legislature ceases. There is no power in the legislature to differentiate between debts by providing that the homestead, as defined, or property

declared exempt shall be subject to certain debts but not to others. This holding has been the established law in this state for more than twenty years, and there has been no attempt within that time to amend the Constitution or disturb the law as announced in that opinion. It is interesting and significant to note in this connection that as early as 1893 the legislature submitted to the people of this state a proposed amendment (chapter 39) to Section 4 of Article 21 of the State Constitution, by which it was provided that mechanics' liens could be enforced against the homestead, but which proposed amendment was defeated by the people in the 1894 election. While this action of the legislature in submitting this proposed amendment would not be conclusive on the court in construing the constitutional provision, it does, we believe, indicate that the legislature of that early date was at least in doubt as to its authority to subject the homestead to a mechanics' lien. Following the decision by the Minnesota court in *Coleman v. Ballandi*, 22 Minn. 144, upon which this court relied in the *O'Leary v. Croghan* case, supra, the Minnesota Constitution was amended so as to subject exempt property to the payment of material or labor 'furnished in the construction, repair, or improvement of the same.' Amendment of 1888 to Section 12, Article 1, Constitution of Minnesota.

"We are of the opinion that any change in the law, as announced in the case of *O'Leary v. Croghan*, supra, must come by constitutional amendment. Applying the rule there announced, we are of the opinion that the legislative attempt to subject the homestead to a debt created for 'the original erection and construction of buildings thereon' is not within the authority of the legislature in that it is an attempt to differentiate between debts and discriminate between creditors.

"We are not unmindful of the holding of this court that the homestead is subject to a vendor's lien. *Hickman v. Long*, 34 S. D. 639, 150 N. W. 298. The reason for such holding is, however, that the vendor's lien attaches prior to the acquisition of the homestead interest, and the homestead acquired where a vendor's lien is retained is only a homestead interest in and to the 'equitable estate' which the purchaser has in the property."

#### LANDLORD AND TENANT

(*George Pelekases v. HOLC*, Municipal Court, City of New York, Borough of Manhattan, Ninth District. Decided October 8, 1940.)

In New York there is no duty on a landlord to a tenant to keep in repair a property that is not a tenement or subject to the Multiple Dwelling Law. Landlord, in such case, cannot be held liable for personal injuries resulting from defect even though he promised to repair the defect complained of by the tenant, such promise being a mere gratuity.



In a suit against HOLC for damages for personal injuries, the opinion of the Municipal Court of the City of New York was as follows:

"This is an action for personal injuries, etc., alleged to have been sustained through the negligence of the defendant. The plaintiffs were tenants occupying the first floor of a building owned by the defendant. The ground floor of the building was occupied by a store and the second floor occupied by another tenant.

"One John J. Mattia, acting as the renting broker for the defendant, rented the apartments to each of the respective tenants. The tenant in the upper apartment testified that for some time prior to the date of the accident, a leak had developed in the tank of the hot water heating apparatus in her apartment. A container had been placed under the leak in order to catch the drip of water. At times, this overflowed and the water would run over the floor and seep down into the apartment of the plaintiffs. It was further testified to by the plaintiff's witnesses that on several occasions when John J. Mattia called for the rent, both of these tenants informed Mr. Mattia of this leak and that he had promised to repair the tank. In any event, no repairs were made. Plaintiffs' witnesses further testified that, as a result of the water leaking down into plaintiffs' apartment, on January 23rd, 1940, the ceiling in plaintiffs' apartment fell and that the plaster struck the plaintiff, Anna Pelekases, and, as a result thereof, she was injured.

"The defendant produced witnesses who testified to the fact that John J. Mattia was not the rent collector but that, instead, a Mr. Laiacono was the rent collector and had collected the rent in this building. That no report had ever been made with respect to the alleged leak. John J. Mattia could not be produced in that he had died prior to the date of this trial. A witness produced by the defendant testified that, shortly after the accident, and even before the ambulance surgeon arrived, he was present in the apartment of the plaintiffs. This fact was borne out by the plaintiffs' witnesses. This witness further testified that he examined the ceiling and found it entirely dry. He further testified to the fact that the ceiling was not made of plaster, but rather of plaster board.

"The mere fact that an accident occurred and that plaintiffs were injured does not of itself give rise to a cause of action against the landlord. The plaintiffs must prove negligence on the part of the defendant by either an omission or commission to act. The question that presents itself is whether or not the defendant had a duty to make the repairs, even though the leaky tank was in the sole control of the upstairs tenant. The building in question is not a tenement house, and the duty imposed by law to make repairs pursuant to the Multiple Dwelling Law does not apply. The record is devoid of any express agreement on the part of the defendant to make repairs.

Under the common law, it was the duty of the tenant to make the repairs in the absence of any express provision in the agreement of leasing. The alleged promise on the part of Mr. Mattia to make the repairs, if such a conversation did take place, is a gratuitous offer and is not binding on the defendant. Frankly, I do not believe that notice was given to Mr. Mattia or that he made such a promise. The plaintiffs do not claim the maintenance of a nuisance on the part of the defendant and this action is brought on the theory of negligence alone.

"Upon all the facts and upon the law, I find that the plaintiffs have failed to establish a cause of action against the defendant. I therefore grant judgment in favor of the defendant. Ten days stay of execution."

#### LANDLORD AND TENANT - TORT LIABILITY

(Ballato v. Industrians Savings & Loan Co., Court of Appeals of Ohio, 28 N. E. (2d) 789)

A person who undertakes the sole and complete control and management of residence property, for the purpose of safeguarding the property upon which he holds a mortgage in default, and which property has been abandoned by the owner, acquires the same legal status for acts of negligence in respect to a tenant as is imposed upon an owner of the fee.

This was an action in tort by plaintiff against defendant for alleged negligence. The defendant held a mortgage on a house and lot. The owner defaulted in his payments and left the property, going to places unknown. The defendant mortgage holder thereupon assumed the management of the house, renting and repairing it, etc., and applying the proceeds to the debt. The property was rented to plaintiff and defendant agreed to make necessary repairs thereto. The tenant thereafter requested the defendant to make repairs to the furnace, and this was done by a workman who was a "handy man," that is, not in the regular course of his work but during his "off" hours. While this workman was in the basement of the house, examining the furnace, the plaintiff went down there to regulate a hot water heater, and, in doing so, she stepped on a rivet which penetrated her shoe and inflicted a severe injury to her foot. It appeared that the rivet or rivets on the floor were part of the tools of the workman.

There were several questions presented by appellant (defendant) among them being (1) was the defendant regarded as the landlord; (2) was the workman an independent contractor or the servant and agent of defendant; and (3) could the plaintiff, as the tenant in possession of her property maintain her claim for damages against the landlord, if



the defendant is held to be the landlord, when men sent by the defendant were inspecting and repairing the furnace in her home?

The appellate court affirmed the decision in favor of plaintiff.

In answer to the first question, the Court of Appeals stated that the charge of the trial court in this respect was correct. The trial court said: "Now, concerning some things you need not have any deliberation, because the court says to you as a matter of law that, in so far as this lawsuit is concerned, you may consider the Industrians Savings and Loan Co. as the landlord, and Dorothy Ballato as the tenant."

In regard to the second question, the court said:

"The rule may be safely pronounced, however, that a person who undertakes the sole and complete control and management of real property at the request of the owner, or who assumes such control and management in the absence of a request of the owner, in order that he may protect his mortgage upon the property, after the owner has defaulted in the mortgage and abandoned the property, stands in the same legal position as an owner, in so far as liability to third persons for injuries growing out of tort is concerned. And, likewise, such person's liability for negligence is the same as the liability of a fee-owning landlord to his tenant or a third person."

"That the relationship between Sigler and the defendant was one of master and servant and not of independent contractor, we believe is established by the evidence in such strength that reasonable minds could reach only that conclusion."

"The Supreme Court of this state has recently reiterated the test applied generally and for many years."

"The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control, or the right to control, the mode and manner of doing the work contracted for? If he did, the relation is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor." Miller v. Metropolitan Life Ins. Co., 134 Ohio St. 289, at page 291, 16 N. E. 2d 447, 448."

As to the third question, the court said that:

"Continuing to answer the questions in dispute in the order presented, this court is of the opinion that the tenant can maintain this action."

"This court in *Miller, Admr., v. Ellis*, No. 1371, Summit County (not officially reported but reported in part in 6 O.L.A 338), set out in its opinion some of the rules which are deducible from the reported cases as to the liability of a landlord to people upon leased property. This court there said:

"1. If the landlord by lease surrenders the possession and control of the entire property to his tenant, in the absence of misrepresentation as to their safe physical condition, he is not liable to a tenant, invited guest or others properly on said property, for injuries they may receive from a defect in the property at the time the lease was made, or from a defect which may arise during the term of said lease.

"2. If the property at the time the lease is made is in a defective condition, which condition results in an injury to a stranger upon an adjoining street or property, the landlord as well as the tenant may be liable in damages for such injury.

"3. If the landlord, at the time the lease is made surrenders the possession and control of the property, and the property at that time is in good repair and becomes out of repair during the term of said lease, and there is no contractual obligation or duty imposed by law upon the landlord to restore the same, and a stranger upon an adjoining street or property is injured as a result of said condition the landlord is not liable.

"4. If the landlord retains control of any part of the leased property, and a tenant, or invitee on said property, is injured, as a result of the defective condition of that part of the property so controlled, the landlord may be liable to the one injured.

"5. If the landlord leases his property under an agreement with his tenant to keep the property leased in good repair, and he, after notice, neglects or refuses to repair, and an invitee or customer of the tenant is injured while upon the leased property because of such failure to repair, the one injured does not stand in the same position as a stranger to said property and the landlord is not liable. (*Burdick v. Cheadle*, 26 Ohio St. 393 (20 Am. Rep. 767).)"

\* \* \*

"The case at bar must be distinguished from these cited cases, for the obvious reason that in this case the landlord through the medium of his servant entered upon the rented premises under agreement to repair and at the request of the tenant. And if a landlord, under such circumstances, through his servant, while making



repairs commits active negligence or misfeasance as distinguished from nonfeasance, and the tenant is injured as a proximate result of such negligence, the tenant can recover in damages, if such tenant is not guilty of contributory negligence."

\* \* \*

#### MORTGAGES - DEFICIENCY JUDGMENTS

(N. Y. Ct. App.; Nat'l. City Bank of N. Y. v. Gelfert, Oct. 8, 1940. (Lewis, J., dissents.) 9 L.W. 2230)

New York statute - prohibiting deficiency judgments in mortgage foreclosure actions except upon motion for such judgment, in which case the amount thereof shall be determined by deduction from debt of sale price of mortgaged property or market value thereof, whichever is higher - cannot constitutionally be applied to mortgages executed prior to enactment of statute.

The deficiency judgment was procured by the mortgagee without a motion therefor, and the amount was determined in accordance with old Section 1083 of the Civil Practice Act, which provided that the measure of a deficiency judgment was the residue of debt remaining unsatisfied after application of the proceeds of sale. Such determination is affirmed.

Section 1083 was amended April 7, 1938 (c.510, L. 1938), prior to the foreclosure sale. The new Section 1083 did not invoke the general welfare or set up "conditions pertinent to emergency relief."

In order to determine whether or not an application of the new section 1083 to this case "transcends the scope of the normal control over judicial remedies which the contracts clause of the Federal Constitution has left to the states," it is necessary to determine the law in force prior to this statute. As the law then existed, "the mortgagor was entitled to credit only for the net proceeds of sale realized by the mortgagee after the deduction of liens for taxes, etc., with resultant liability to the mortgagor for the deficiency (Marshall v. Davies, 78 N. Y. 414, 422). \*\*\* It was this system of foreclosure that entered into the engagement of the present parties and created and defined the legal and equitable obligations of their contract."

Under the new Section 1083, the former system of foreclosure has been markedly changed, so that "a mortgagee must on foreclosure bid in the property at a price that shall at least equal the market value as that value may thereafter be determined by the court or must go

without any satisfaction of so much of the debt as equals the difference between the value as so determined and a lower price paid on a sale to a third party."

"In the face of all this, we do not see how a retroactive operation of the new Section 1083 can be reconciled with the principal 'that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract, that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States.' (Barnitz v. Beverly, 163 U. S. 118, 122.) Consequently we conclude that as to mortgage contracts previously made (as are the contracts in suit) the new section 1083 is void."

#### TAXATION - CORPORATIONS

(State v. J. Bodenger Realty Co., \_\_\_ La. \_\_\_, 197 So. 741.)

A State's lien for unpaid corporation franchise taxes is superior in rank to a pre-existing vendor's lien and mortgage. A statute imposing a franchise tax on corporation doing business in the state and providing for a first lien on the corporation's property for unpaid taxes is constitutional.

This was a proceeding brought by the State of Louisiana against J. Bodenger Realty Company to recover franchise taxes, interest, and penalties. The Suburban Building and Loan Association (now the Union Savings and Loan Association) intervened after foreclosing a mortgage executed by the Bodenger Realty Company to rank the respective privileges. The intervenor received judgment in its favor and the State of Louisiana appealed. The judgment was reversed and set aside.

The Suburban Building and Loan Association sold the defendant some land for \$10,000 represented by a promissory note and retained a vendor's lien on the property. The realty company gave the building and loan association a first mortgage and authorization to sell the property by executory process upon failure of the maker to pay promptly. Subsequently to this sale, Act No. 8 of 1932 of the General Assembly of Louisiana was adopted, imposing a franchise tax on corporations doing business within the state, which provided that the State should have a first lien on the property of the corporation for unpaid taxes. In 1935 the State of Louisiana obtained a judgment against the Bodenger Realty Company for franchise taxes due for the years 1933 and 1934. In 1937 the Suburban Building and Loan Association foreclosed on the mortgage and the property was offered for sale at public auction and brought in by the association. After deducting from the price of the



adjudication all the costs and real estate taxes assessed against the property, the balance was insufficient to satisfy the State's judgment for the franchise taxes and the Association's writ of seizure and sale in the foreclosure proceedings. The Association filed a rule in the present proceedings to rank the respective privileges. The lower court declared Act No. 8 of 1932 of the General Assembly of Louisiana unconstitutional in so far as it sought to make the lien for the franchise taxes superior to the Association's mortgage and vendor's lien. The State appealed and the Supreme Court of Louisiana in reversing the decision of the lower court said:

"Counsel takes the position that the legislature did not declare clearly and unambiguously, in Act No. 120 of 1902, as amended, the State's lien for unpaid corporation franchise taxes shall prime a pre-existing vendor's lien and mortgage and for that reason, the statute is susceptible of two interpretations and the one less onerous to the taxpayer must prevail. Counsel cites authorities to the end that statutes must be construed liberally in favor of the taxpayer and that, when a statute is susceptible of two interpretations, the one most favorable to the taxpayer must prevail.

"In a very recent case, we held that the State's lien for unpaid corporation franchise taxes is superior in rank to a pre-existing vendor's lien and mortgage. *Hibernia Mortgage Company v. Greco*, 191 La. 658, 186 So. 60. An examination of Act No. 120 of 1902, as amended, reveals that it provides for the organization of homestead associations, etc., and defines the rights, powers and privileges of such corporations, etc. We find no language used in the Act referring to the taxing power of the State or liens granted for unpaid taxes. If the Legislature had intended to give the lien provided for a superiority over a subsequent State's lien for unpaid taxes there would have been some language used to indicate such intent. It is apparent that the statute only contemplated transactions between individuals or private corporations. A large percent of the business of a homestead association involves the sale and resale of property. The party desiring a loan transfers his property to the homestead association, and the homestead association retransfers the property to this same party reserving a vendor's lien and mortgage. From the very nature of the transaction, title to the property was never intended to be parted with and, in the absence of any special statute, it is doubtful whether a homestead association under such circumstances would acquire more than a mere mortgage. Such being the case, it is our opinion that the provision in the statute granting a vendor's lien and privilege was placed therein for the benefit of the homestead associations to grant them a vendor's lien of a like nature to that retained when title to the property was actually parted with. The language used in Section 9 of the Act, as amended, is very broad but there is nothing to indicate that the Legislature

contemplated the taxing power of the State or the liens granted for unpaid taxes. If it had been the intention of the Legislature that this Act should affect subsequent liens granted the State for unpaid taxes, such language would have been used to indicate such intent."

\* \* \*

"Counsel contends that, assuming the State's version of the legislative intent to be correct, it would impair the obligations of the intervenor's charter and contract of security in violation of the contract clauses of the Federal and State Constitutions. Const. U. S. Art. 1, § 10; Const. La. 1921, Art. 4 § 15."

"The question presented was determined in the Greco case. Counsel attempts to draw a distinction between the power to tax and the power to make the tax effective as a lien on property. On the basis of this distinction, counsel contends that the tax statute is unconstitutional in so far as it attempts to give the State a lien of a superior rank over that arising from conventional obligations before the origin of the tax. Counsel also advances the argument that the statute is unconstitutional because it introduces a change in the terms of its contract and the remedy of its enforcement. To accept these arguments, we would have to recognize that there was a distinction between the power to tax and the power to create a lien to secure the payment of the tax and consider the statute as impairing the defendant's contract by changing its terms and the remedy of its enforcement. The arguments advanced are answered in the Greco case. We held in that case that a statute which levies a tax which affects only incidentally the obligations of private contracts, previously entered into, does not violate the contract clauses of the Constitution for the reason that such contracts are made with reference to the taxing power inherent in the State and are made in subordination to that power. We pointed out therein that the only cases to the contrary are where the statute levies a tax and creates a lien to secure the payment thereof, which would have the effect of repudiating or impairing the obligation of a contract entered into by the State herself, or by one of her municipalities, political corporations or agencies."



TORTS - NUISANCES

(Thomas J. Leamy v. HOLC, Supreme Court, Onondaga County, New York. Decided September 28, 1940.)

In New York a municipal ordinance requiring property owners to keep sidewalks in safe condition free from snow and ice creates no liability of property owner except for nuisance created by affirmative act of his.

In a suit against HOLC for damages for personal injuries, the opinion of the Supreme Court of Onondaga County, New York, was as follows:

"Morehouse, J. The complaint herein, which the defendant moves to dismiss as failing to state facts sufficient to constitute a cause of action, alleges personal injuries sustained by the plaintiff by reason of a fall upon a sidewalk in front of premises in the City of Syracuse, New York, owned by the defendant. He alleges violation of a city ordinance, which imposed upon the defendant the duty to keep its sidewalks in a safe condition free from snow and ice, which resulted in an accumulation of solid covering of snow and ice seven or eight inches thick. The complaint charges neglect upon the part of the defendant in this respect and the creation of a public nuisance.

"In support of its motion to dismiss the complaint, the defendant contends that liability to maintain streets and highways in a safe condition is primarily that of the municipality, and that an ordinance which imposed an obligation upon the abutting owner was in the nature of a police regulation and did not confer upon an injured party any cause of action against the owner. This principle is undoubtedly correct and has been laid down by the Courts in many cases, including that of City of Rochester v. Campbell, 123 N. Y. 405 cited by the defendant.

"The complaint charges that the neglect of the defendant created a dangerous and hazardous condition which constituted a public nuisance. The same rule as to the liability of an abutting owner applies to the case of a nuisance unless the condition which constitutes the nuisance has been created by some affirmative act of the owner. Otherwise, there is no cause of action against him. Eldred v. Keenan, 164 A. D. 63; Nelson v. Schultz, 11 N. Y. S. (2nd) 184. The attorney for the plaintiff, in his memoranda upon this motion, states that the proof will show an attempt to remove the accumulation of snow and ice in a negligent manner but the complaint itself alleges no more than passivity upon the part of the defendant.

"Upon a reading of the complaint, there is nothing before the court to indicate any actionable wrong upon the part of the defendant and the complaint must, therefore, be dismissed with costs."

ADMINISTRATIVE ORDERS, REGULATIONS and OPINIONS

U. S. CIVIL SERVICE COMMISSION published a notice of the condition of the apportionment at the close of business October 15, 1940. See 5 Fed. Reg. 4185.

FARM CREDIT ADMINISTRATION: The Governor, by regulation filed October 21, prescribed the division of lending authority between the Central Bank for Cooperatives and the district banks for cooperatives. See 5 Fed. Reg. 4169.

The Federal Land Bank of Louisville, by regulation filed October 28, amended its schedule of fees with respect to reamortization fees. See 5 Fed. Reg. 4257.

FARM SECURITY ADMINISTRATION: The Administrator, by orders filed October 29, designated certain counties, and certain localities therein, in which loans may be made under Title I of the Bankhead-Jones Act. See 5 Fed. Reg. 4306-7.

The Administrator, by order filed October 24, determined the value of the average farm unit of 30 acres and more in certain designated counties in Michigan. See 5 Fed. Reg. 4227.

RURAL ELECTRIFICATION ADMINISTRATION: The Administrator, by orders filed October 17, allocated funds to designated projects in Minnesota, Ohio, Oregon, Pennsylvania, Texas, Washington, and Wyoming. See 5 Fed. Reg. 4147.

UNITED STATES HOUSING AUTHORITY: The Secretary of the Treasury, by Department Circular No. 643, filed October 24, invited subscriptions from the public for U. S. H. A. notes, 1/4% Series E, and published the terms and conditions of such notes. See 5 Fed. Reg. 4224-5.



TAXATION - INTERNAL REVENUE - INCOME TAX

(G. C. M. 22272, Oct. 7, 1940 (O.D. 42 is revoked by I.T. 3416) 9 LW 2222).

Subletting of apartment by tenant who is required to change his residence to another city is "transaction entered into for profit," so that loss on such transaction is deductible.

The ruling in O.D. 42 (1919) is in conflict with the principle announced by the Supreme Court in *Heiner v. Tindle*, 276 U. S. 582. The latter case held that loss resulting from the sale of property purchased as a personal residence and later appropriated exclusively to the production of taxable income is deductible from gross income under Section 214(a)5 of the 1918 Act. "The court stated that the words, 'any transaction entered into for profit,' as used in Section 2.4(a)5, are broad enough to embrace any action or business operation, such as that with which the Court was concerned, by which property previously acquired is devoted exclusively to the production of taxable income."

The language in *Schmidlapp v. Com'r*, 96 F. 2d 680, in which the taxpayer was denied a loss deduction for rent paid for an apartment which he was unsuccessful in renting after he abandoned it and moved to another, "indicates that the same reasoning should be applied to an apartment which has been leased and then sublet by the original lessee."

LEGISLATION

NEW PHILADELPHIA ORDINANCE REQUIRES SIGNATURE AND SEAL OF REGISTERED  
ENGINEER OR ARCHITECT ON PLANS FOR CERTAIN BUILDINGS.

"The Building Code Ordinance, Section 300, states that applications for permits shall be made in writing by the owner or his agent. Such applications shall contain, moreover, an affidavit executed by the owner or his agent or some other responsible person satisfactory to the Bureau of Building Inspection, deposing to the truth of the statements made in such application and/or the accompanying drawing.

"Therefore in the interest of safeguarding public life, health and property, and acting under authority contained in this provision of the Building Code, the Bureau of Building Inspection announces the following regulations, effective July 15, 1940, for the drawings required to be submitted with applications for construction and alteration permits, or where a permit is required by the Bureau of Building Inspection.

"All such drawings, whether they be preliminary or the finished drawings, shall bear the signature and seal of an architect registered and licensed in Pennsylvania, or the seal of an engineer, registered and licensed in Pennsylvania, with the following exceptions:

"(1) Row and semi-detached dwellings.

"(2) Detached dwellings not over two stories in height of third class construction with a total area not exceeding 1500 square feet and/or the estimated cost of which does not exceed \$10,000 per dwelling.

"(3) Garage buildings not exceeding three-car capacity, and not more than one story in height.

"(4) Dwellings to be converted into a store and dwelling or business building, etc., wherein the combined total floor area will not exceed 1800 square feet.

"(5) Other structures than the above where the estimated cost of alteration does not exceed \$3000, exclusive of sprinkler installation or of additional new construction.



"Acts of the Assembly of Pennsylvania governing the registration, licensing and practice of architecture and engineering set forth various requirements that architects, engineers, individuals, firms, or corporations should know and follow.

"The administration of these regulatory acts is by the State Department of Public Instruction."

NATIONAL DEFENSE HOUSING ACT  
(Public No. 849)

Prepared jointly by the Library of Congress, the office of the Secretary to the Commission, and the office of the Counsel to Industrial Materials Department.

(The bill H. R. 10412, was introduced by Mr. Lanham August 27, 1940.)

Purpose of the Act

The purpose of the act is to provide housing facilities for persons engaged in national-defense activities at places where necessary housing facilities are not otherwise available. [The present defense program and the expansion of activities in connection therewith have brought about and will continue to bring about acute housing shortages in some places where these activities are carried on.]

Location and Extent of Proposed Housing

Housing is to be provided in areas or localities in which the President finds that there exists an "acute shortage" of housing, which would not be provided by private capital when needed.

In this connection, the following table (taken from Senate Rept. No. 2137, 76th Cong., 3d session) indicates the need for housing units as reported to the office of the Defense Housing Coordinator up to September 10, 1940, together with an indication of the portion of that need taken care of under the Second Supplemental National Defense Appropriation Act, 1941 (Public, No. 781, 76th Congress).

Land Acquisition

This act authorizes the Federal Works Administrator to acquire, prior to approval of title by the Attorney General [R. S. 1136] improved or unimproved lands or interests therein by purchase, donation, exchange, lease, or condemnation. The statutory requirements are

waived with respect to competitive bidding /R.S. 3709/, rental limitation of 15 percent of fair market value /act of June 30, 1932, sec. 322, 47 Stat. 412/, the prohibition on renting in the District of Columbia prior to specific appropriations therefor /act of March 3, 1877, 19 Stat. 370/, and any time limit on the availability of funds for the payment of rent.

### Housing Construction

The act authorizes the planning and construction of buildings and facilities on the lands acquired, and the procurement of equipment and materials, prior to approval of title by the Attorney General /R. S. 1136/ and without regard to the requirement of detailed estimates /R. S. 1136/, the 25-percent-of-rental limitation on the amount which may be expended on rented property /act of June 30, 1932, sec. 322, 47 Stat. 412/, the competitive bidding requirements /R. S. 3709/ or any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contracts, the approval thereof or the submission of estimates therefor. In operations under the act, the Administrator is authorized to utilize any Federal agency, and, with its consent, any local public agency.

### Building Cost Limitations and Rentals

The cost per family dwelling unit shall not exceed an average of \$3,000 within the continental United States nor an average of \$4,000 elsewhere, with a maximum per family unit of \$3,950 within the continental United States and \$4,750 elsewhere. Said maximum shall be exclusive of administration expenses, land acquisition, public utilities and community facilities. Cost-plus-a-percentage of cost contracts are prohibited, but contracts on the basis of cost plus a fixed fee are permitted.

The Administrator is required to fix fair rentals which shall be within the financial reach of persons engaged in national defense.

### For Whom Housing Constructed

Housing under the act is to be provided for "...persons engaged in national-defense activities..." These are defined to include (1) enlisted men in the naval or military services, (2) civilian employees in the Navy and War Departments assigned to duty at naval or military reservations, posts, or bases, and (3) workers engaged or to be engaged in industries connected with and essential to the national defense.



Authorization and Reimbursement of Appropriations

Authorizes an appropriation of \$150,000,000 inclusive of administrative expenses, out of which the Administrator is to reimburse \$3,300,000 to the emergency funds made available to the President under the act of June 11, 1940 (Public No. 588), and \$6,700,000 to the emergency funds made available under the act of June 13, 1940 (Public No. 611). The transfer to the Federal Works Agency of funds of other Federal Agencies which may be available for national defense housing is authorized.

Termination of Authority under the Act

The authority to acquire lands and build thereon, as above noted, is to terminate when the President declares that the emergency proclaimed on September 8, 1939, has ceased to exist, but such authority shall continue with respect to contracts previously entered into or court proceedings then pending.

Local Taxation and Jurisdiction

The act permits agreements with local taxing authorities for the payment of annual sums in lieu of real-property taxes, but not to exceed the taxes which would be paid if the properties were not tax-exempt. The civil and criminal jurisdiction of the State or political subdivision, and the rights of inhabitants on the property under local law are not to be impaired by the acquisition of the property by the United States.

Wages and Hours

An 8-hour day, with provision for overtime at one and one-half times the basic rate of pay is provided; payment of prevailing wages is required.

LEGAL COMMENT

LEGISLATION IN COLOMBIA PROVIDING FOR THE IMPROVEMENT OF RURAL HOUSING.\* Material for this summary was taken from a section entitled: Instituto de Crédito Territorial. Mejoramiento de la Vivienda Campesina en Colombia; which appeared in the Revista Nacional de Agricultura [Bogotá], v.35, No. 430/431, pp. 29-30. April/May 1940. It was divided into parts giving the legislation on the subject, the statutes of the Territorial Credit Institute, an explanation of the requirements for loans and the construction and warehouse service of the Institute. The forms and contracts used in connection with the loans were given in a series of supplements to the article.

The series of decrees and laws providing for the improvement of rural housing in Colombia includes the Decree Law No. 200 of January 28, 1939, Law No. 46 of December 13, 1939. Decree No. 306 of February 15, 1940, and Decree No. 818 of April 25, 1940. These establish machinery for credit to peasants or people engaged in agriculture, to be used in building or improving their houses.

#### Organization of the Territorial Credit Institute

This legislation gives the territorial credit banks power to promote the construction of hygienic houses for agricultural workers, through an independent office, located in Bogotá, called the Territorial Credit Institute. This Institute is charged with promoting the establishment of credit banks and coordinating their activities. While it may establish branch offices in various municipalities, it has preferred to use the eighty offices of the Bank of Agrarian, Industrial and Mining Credit, and the sectional agricultural credit societies, under a contract of April 2, 1940. In addition to these, it may use the services of the Bank of the Republic, the Colombian Savings Bank, the Agricultural Mortgage Bank, the construction cooperatives, and the National Rural Housing League.

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\*For translation and summary of this article, we are indebted to Miss Helen E. Hennefrond, Library, Bureau of Agricultural Economics, U. S. Department of Agriculture.



The Territorial Credit Institute is organized for a period of forty years, and its capital is to be divided into bonds of 100 pesos each up to the amount of 3,500,000 pesos. This amount is to be subscribed to as follows: up to 3,000,000 pesos by the National Government; and up to 500,000 pesos by the departments and municipalities. The Institute may open operations when 1,000,000 pesos of its capital have been paid in. Loans may be made for a period of up to 30 years and are not to exceed 1000 pesos in any one case. The Institute may also issue bonds which will be guaranteed by the State. It is empowered to hold shares in the territorial credit banks and may invest up to 50% of its paid capital in this way. According to Law No. 46 of 1939, the Institute and the Territorial Credit Banks are to receive 3% interest on debts. The State is to cover the difference between this 3% and 8% up to a million and a half pesos of credit operations for houses costing no more than 600 pesos each. The State is also to cover the amount of life insurance which is required of the debtor in order to permit liquidation of the debt in the event of his death.

#### Supervisory Council of the Institute

The Supervisory Council of the Institute is made up of six members: the Minister of Finance and Public Credit; the Minister of Labor, Hygiene and Social Provision; a member elected by the directing council of the Agricultural Mortgage Bank and the Bank of Agrarian, Industrial and Mining Credit; two representatives of the "poor" peasants, designated by the President of the Republic; and one other member named by the President of the Republic.\*

#### Warehouse and Technical Services of the Institute

Provision is made, in addition to the regular personnel, for a technical division which is to study housing plans and supervise construction work. The Institute also has a warehouse service which may manufacture and import cement and other materials to be made available at cost price, plus administrative expenses, to persons obtaining a loan. Under certain conditions, it may make loans to others not owning their land (e.g. those living on public lands) but wishing to build or improve their houses. Certain exemptions are made to the Institute in regard to customs, consular, tonnage, port and river charges, and special arrangements have been made for transportation of building materials on the country's railroads.

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\*Taken from the Statutes of the Institute.

Since it was found that peasants were having difficulties in finding proper building materials and had no idea of the technical end of house building, the Supervisory Council undertook the work of putting up model houses in the various regions, receiving help in this from the Ministry of Labor, Hygiene and Social Provision. Specifications are given for the different types of houses. Type No. 4 calls for 1,300 pesos and, since the maximum loan is 1,000 pesos, the farmer must make up the difference in some way himself. All houses built on loans must comply with certain hygienic conditions.

### Eligibility for Loans

Loans may be made to the following: 1) directly to small rural landowners for building homes; 2) to large ranch owners for the construction of workers' lodgings; 3) to the departments and municipalities to promote the construction of small rural homes within their territories.

Loans may be granted for community homes, where several families or groups of workers live, up to a maximum of 1,000 pesos, but approval for these is reserved for the Institute's Supervisory Council at Bogotá.

Law No. 46 of 1939 distinguishes between so-called poor (pobre) peasants, i. e. those having a capital of less than 3,000 pesos, and wealthier ones (pudientes) having more than 3,000 pesos. The peasant obtaining a loan must be living regularly in the country, engaged in agricultural work, and (if he is classified as "poor") his capital must not exceed 3,000 pesos. He may, however, have as much as 4,000 pesos and still be classified as "poor" if he has more than four minor children. In this case the loan may exceed the normal 600 pesos by 100 pesos for each child over the four, providing the total amount does not exceed 1,000 pesos. Preference is to be given to poorer and larger families.

### Procedure for Loan

The peasant must make his application on a special form, adding a declaration of his financial status which must be properly witnessed. He must also present: 1) the document by which he acquired the land he is offering as security; 2) a written certification by the President of the Local League or the mayor and local clergyman that he actually owns the land, that he is working it economically, that the parcel is not visibly a part of some larger estate over which any other person has rights of ownership, that these ownership rights have been exercised for at least a year prior to date of certification, and that



the peasant is generally recognized by his neighbors as owner of the parcel; 3) a certificate from the municipal treasurer that the peasant has been paying the real estate tax on the parcel prior to the date of the present decree (No. 818 of 1940), and that the parcel does not appear on the register as part of a larger estate.

He must also present a statement as to the character of his ownership, copies of the transfer records of the estate covering the preceding 20 years, and a certification from the Registrar of Public and Private Instruments as to his clear title to the property.

Decree No. 306 of 1940 provides for obligatory life insurance for all debtors of the Institute. An arrangement was made for a collective policy under the Colombian Life Insurance Company, and an amortization table was worked out for the various age groups. Premiums on the policies are to be changed each year, taking into account the age of the debtor and amount of loan, and are to be paid by the National Government in the case of "poor" peasants. Wealthier peasants must pay the premiums themselves along with the monthly amortization payments.

The agency of the Institute receiving the request for loan passes the data on to its consulting attorney for consideration of the property title. If this is approved, the office receiving the application sends an agent to inspect and appraise the property, and to ascertain its size and boundaries, and crops produced on it, the period for which it has been owned and economically exploited by the peasant, that it is not visibly part of a larger estate, and that no one else is sharing in its profits. He also verifies the age of the applicant given on the application, for the purposes of the life insurance policy required for all loans, and learns the farmers' wishes regarding the type of house to be built.

The data then go to the technical section where a study is made of the construction plans, the materials needed and the cost of labor, and investigation is made to see if the loan will cover these.

The report of the technical section completes the data on the application, which is then given to the Supervisory Council of the local credit agency affiliated with the Institute for final approval. The Supervisory Council must take into account the following: 1) that the loan is really going to someone living in the country, engaged in agriculture or livestock raising; 2) that the house is for a family, not a single person; 3) that the applicant has complied with all the requirements connected with the application; and 4) that the profits from the estate will insure the amortization payments on the loan.

In accordance with a provision of Law No. 46 of 1939 providing for State aid to poor peasants, an interest rate of no more than 3% annually may be charged, and this may be reduced to 1% if the term be shortened to ten years. A table is given showing the amortization amounts. (Supplement 4, p. 73, of the April/May 1940 issue of the *Revista Nacional de Agricultura*.) The interest rate is 8% for ranch owners building workers' lodgings and for departments and municipalities requesting loans.

Payment of loans is in installments. In order to obtain succeeding installments, a peasant must give proof that he has used the previous payments for construction work. In cases where the Institute itself is doing the construction work, the money goes into an account called "Acreedores Varios" and reverts directly to the Institute, which must present to the farmer a complete accounting of construction costs.

Under Law No. 46 of 1939, farm properties will not be subject to the real estate tax while the loan is being paid off, provided their entire value after improvement does not exceed 1,500 pesos.

MORTGAGES SHOULD BE MODERNIZED. By Edwin C. Emhardt in *Real Estate Magazine* (October 1940) 6-7.

This article embodies a discussion of mortgage lending from the viewpoint of the real estate investor and, as its title indicates, purports to be an argument for modernization of mortgage law.

The author is a former member of the Pennsylvania Legislature, and the emphasis is, therefore, upon Pennsylvania law and practice. He points out (1) that present mortgage forms fail to reflect the true agreement between the parties, and should, therefore, be revised; (2) that mortgagors ought to be given credit for the full or fair value of the property pledged; and (3) that, in order to retain the attractiveness of mortgage lending to investors, the mortgagees' remedies should be simplified.

Under the first point, attention is directed to the fact that a mortgage form is, on its face, a conveyance instead of a pledge. As a result, we are told, there is a conflict of interests, the mortgagee and the courts striving to enforce the contract as written, while the mortgagor, with the help of the Legislature, seeks to interpret the transaction as a pure debtor-creditor arrangement. Under the second point, the author intimates that the principle of inviolability of contracts operates to prevent relief to mortgagors whose property may be



sold below fair value. Acts of the Pennsylvania Legislature attempting to relieve mortgagors in various ways during the depression, all of which were declared unconstitutional by the Pennsylvania Supreme Court, **are cited.** The author states that, by reason of these decisions, mortgagors were relegated to such relief as the courts could grant and found the courts unable or unwilling to act for mere inadequacy in price. The conclusion is expressed that, except in extreme cases where it can be said that the sale price is so low as to amount to legal fraud, mortgagors cannot look to the courts for relief. Under the third point, attention is called to the fact that foreclosure must be facilitated in order to make mortgage investments attractive and keep available a supply of capital to finance the acquisition of homes. Various further acts of the Pennsylvania Legislature are cited, the effect of which is to brush away legal technicalities and lengthy procedures in foreclosing mortgages, and to make the collection of the debt reasonably easy and inexpensive.

Attention is called to the diametric interests involved in striving to facilitate the mortgagees' remedies and, at the same time, to insure credit for fair value to the mortgagor.

The article is to be concluded in a later issue of the Real Estate Magazine. It is perhaps for this reason that no specific suggestions for solution are offered.

SELECTED REFERENCES

(The following list of current references, while by no means exhaustive, indicates the availability of material concerning legal problems regarding housing, and related documents.)

HOUSING-Construction-Wyoming

Minimum construction requirements for new dwellings located in Wyoming. Federal Housing Administration, Cheyenne, Wyo. Revised Sept. 15, 1940. 1940. (2)/24 p. il. (FHA form 2355). Federal Housing Administration. FL 2.11: W 99/940-2

Recent developments in dwelling construction. Revised July 1, 1940. 1940. (1)/13 p. (Technical bulletin 1; FHA form 2212). Federal Housing Administration. Paper, 5¢. FL 2.15:1

-Defense

Expediting provision of housing in connection with national defense. Report to accompany H. Res. 594 (for consideration of H. R. 10412), to expedite provision of housing in connection with national defense; submitted by Mr. Colmer. Sept. 9, 1940. 1 p. (H. rp. 2934, 76th Cong. 3d Sess.) Paper, 5¢. Rules Committee, House.

In connection with national defense, report to accompany H. R. 10412 (to expedite provision of housing in connection with national defense); submitted by Mr. Connally. Sept. 14, legislative day Aug. 5, 1940. 5p. (8 rp.) Public Buildings and Grounds Committee, Senate.

Federal housing of war industry workers, 1917-18. (1940) 8 p. (Serial no. R. 1140). (From Monthly labor review, July, 1940). Labor Department - Labor Statistics Bureau. L 2.6/a: H 817/18

Public buildings and grounds, hearings, 76th Congress, 3d session, on H. R. 10412, to expedite provision of housing in connection with national defense, Aug. 29-Sept. 3, 1940. 1940. ii/97 p. (No. 11) Paper, 10¢. Public Buildings and Grounds Committee, House

Y 4.P 96/6:B86/76-3, No. 11



To expedite provision of housing in connection with national defense.  
Report to accompany H. R. 10412; submitted by Mr. Lanham. Sept. 5, 1940. 6p. (H. rp. 2923, 76th Cong. 3d Sess.) Paper, 5¢. Public Buildings and Grounds Committee, House.

-General

Federal Housing Administration Clip Sheet, v. 24, No. 5-8; Sept. 3-24, 1940. (1940). Each 1 p. il large 4<sup>o</sup> (Weekly). Federal Housing Administration. FL 2.7:24/5-8

-Public

Terms, covenants and conditions comprising pt. 2 of consolidated contract for loan and annual contributions between local authority and United States Housing Authority. Rev. Aug. 1, 1940. (1940). cover title iv/66/xv p. Federal Works Agency - Housing Authority  
FW 3.2L 78/pt.2/940-2  
v.2, No. 10-13; Sept. 3-24, 1940. (1940) Each 4 p. or 8 p. il. 4<sup>o</sup>.  
(Weekly Issued with perforations). Paper 5¢ single copy, \$1.00 a yr.; foreign subscription, \$1.80. Federal Works Agency - Housing Authority.  
FW 3.7:2/10/13

-Rural

Work and interests of Bureau of Agricultural Chemistry and Engineering in rural housing, paper prepared by Wallace Ashby for rural housing get-together of Central Housing Committee on Rural Housing. Aug. 5, 1940. (1940) 3 leaves. (Processed). Agricultural Department - Agricultural Chemistry and Engineering Bureau. A 70.4:64

LAW

-General

Comparative law series. Comparative law series, monthly world review, v. 3 No. 8; Aug. 1940 (1940) (2)/411-466/(2)p. (Division of Commercial Laws). Paper, 10¢ single copy, \$1.00 a yr.; foreign subscription, \$1.50. Foreign and Domestic Commerce Bureau. C18.79:3/9

-Same, v. 3, No. 9; Sept. 1940. (1940). (2)/467-520 p. (Division of Commercial Laws). Foreign and Domestic Commerce Bureau  
C18.79:3/9

MISCELLANEOUS

-Federal Home Loan Bank Review, v. 6, No. 12; Sept. 1940. cover title p. 401-440, il. 4<sup>o</sup> (Monthly. Includes Index of v. 6, Federal Home Loan Bank Review, Oct. 1939-Sept. 1940. Text and illustration on p. 2

and 3 of cover. Paper, 10¢ single copy; \$1.00 a yr.; foreign subscription, \$1.60 Federal Loan Agency - Federal Home Loan Bank Board.  
FL 3.7:6/12

Reconstruction Finance Corporation Act, with amendments (Jan. 22, 1932 - June 26, 1940); compiled by Elmer A. Lewis, superintendent Document Room, House - House of Representatives.

Y 12; R24/2/940

## MORTGAGES

### -Farm

Appraising farms for mortgage loans. (1939, reprint 1940). 16 p. il. narrow 8° (Circular 13.) Farm Credit Administration  
FCA 1.4:13/2-2

### -Foreclosures

Non-farm real estate foreclosures. July, 1940. Aug. 27, 1940. (4 leaves, 1 pl. 4° (Research & Statistics Division). Monthly. Processed. Federal Loan Agency - Federal Home Loan Bank Board  
FL 3.8:940/7

### -Insured

Insured mortgage portfolio, v. 5, No. 1; 3d quarter 1940 (1940) cover title, 44 p. il 4° paper, 15¢ single copy, 50¢ a yr.; foreign subscription 70¢. Federal Housing Administration.

## PLANNING

Planning committees cooperate with local governments. (1940) 11 p. (County Planning series No. 8). (Prepared in cooperation with Extension Service, Agriculture Department and Public Roads Administration, Federal Works Agency). Agriculture Department - Agricultural Economics Bureau.  
A36.120:8











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# · HOUSING ·

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# LEGAL DIGEST

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Number 77

December 1940

An immediate result of the enactment of the Civil Relief Act of 1940 should be to stimulate real estate transactions, which have been considerably curtailed recently due to the uncertainties resulting from the talk of war and conscription. The revival of the Act affords assurance to those who might be drawn into military or naval service that their interest in a real estate lease, contract or mortgage will be protected during the time they are in the service.

From an Article by David A. Bridewell in The Journal of Land and Public Utility Economics (Nov. 1940); reprinted in United States Building and Loan League Legal Bulletin. (Selected References)

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
CENTRAL HOUSING COMMITTEE WASHINGTON, D. C.

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## HOUSING LEGAL DIGEST

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The Editors of the HOUSING LEGAL DIGEST endeavor to present as completely and impartially as possible material relating to housing legal problems: but they assume no responsibility for opinions expressed herein and no inference may be drawn as to their agreement or disagreement with viewpoints expressed.

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DECISIONS

BANKRUPTCY

(In re Mahaffey, District Court, W. D. New York, 34 F. Supp. 760)

A Conciliation Commissioner is not acting within his province in finding that a petition filed by a debtor for his adjudication in bankruptcy was not filed in good faith and that the debtor's financial condition was such that she was beyond all hope of rehabilitation. Such a determination cannot be made until an adjudication in bankruptcy has been made.

A debtor's petition was filed in bankruptcy under section 75 of the Bankruptcy Act by Florence C. Mahaffey. A meeting of creditors was held before the Conciliation Commissioner, but since no composition or extension proposal was agreed upon the petitioner, a few months later, filed an amended Debtor's Petition. When the original petition was filed, there was pending an action of foreclosure on lands owned by the petitioner and the lands were advertised to be sold. A few days before the sale was to take place the court granted an order staying the sale on such foreclosure on the ground of the pendency of the bankruptcy proceedings. The plaintiffs (mortgagees) herein moved the court for an order setting aside the order staying the foreclosure proceedings and dismissing the bankruptcy proceedings. The basis for this motion was that the petition in bankruptcy "was not filed in good faith in that her plan for composition or extension is not feasible." The Conciliation Commissioner reported that in his opinion the petition was not filed in good faith and that the debtor's financial condition was such that she "Was beyond all hope of rehabilitation."

The court in staying the foreclosure proceedings and finding that the Conciliation Commissioner was not within his rights in his findings said:

"\*\*\*Such a finding by the Commissioner is not within the province of his office. This determination cannot be made till an adjudication in bankruptcy. The debtor has the absolute right to file a petition for adjudication as a bankrupt and to follow the procedure provided by law with the purpose to retain possession of her property. It is true that the likelihood of financial rehabilitation appears extremely doubtful. While the petitioner in her original schedules



valued her total assets at \$17,551.38, upon the hearing before the Commissioner she placed this value at \$8,338.61. She owes unpaid taxes in the amount of \$3,000, secured claims in the amount of \$14,273.74, and unsecured claims of about \$194.95.

"The statute provides that either upon the filing of the amended debtor petition, or at the first hearing thereunder, the debtor may petition for an appraisal of his property a setting off of exemptions and the retention of property under the supervision of the court. Such a hearing has not been held. Provided the debtor makes such a petition, further proceedings will be had before the Referee, subject, of course, to review by the court.

"The courts have gone a long way to extend their protecting arms around the farmer-debtor. The recent case of John Hancock Ins. Co. v. Bartels, 308 U. S. 180, 60 S. Ct. 221, 223, 84 L. Ed. 176, clearly states that the "reasonable probability of the financial rehabilitation" is not required to be shown to permit an extension and that "lack of good faith" is not to be imputed from such improbability. See also Wright v. Vinton Branch, 300 U. S. 440, 57 S. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455; Adair v. Bank of America, 303 U. S. 350, 58 S. Ct. 594, 82 L. Ed. 889. It is not intended to be understood that the debtor is entitled to an extension under any and all circumstances. If the debtor cannot pay adequate rent and maintain the property, these are factors which should be considered. A stay of the foreclosure is not an absolute one. Wright v. Vinton Branch, supra. Any question in that regard must await the action of the Referee and the Court."

CONSTITUTIONAL LAW - DEEDS - RESTRICTIVE COVENANTS - RES JUDICATA

(Hansberry v. Lee, ---U. S. ---, Decided Nov. 12, 1940).  
Petitioners were not bound in a "class" or "representative" suit where their interests were not represented. One is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.

The respondents brought this suit in the Circuit Court of Cook County, Illinois, to enjoin the breach by petitioners of an agreement restricting the use of land within a described area of the City of Chicago, which was alleged to have been entered into by some five hundred of the land owners. The agreement stipulated that for a specified period no part of the land was to be "sold, leased to or permitted to be occupied by any person of the colored race" providing, however, that it was signed by "owners of 95 per centum of the frontage" within the

prescribed area. The bill of complaint stated that the petitioners are negroes and occupying land in the restricted area formerly belonging to an owner who had signed the agreement; and that the respondents are owners in the area and have signed the agreement together with the owners of 95 per cent of the frontage of the land.

The petitioners stated that the agreement had not become effective because 95 per cent of the frontage owners had not signed it, to which respondents replied that the issue was *res judicata* by the decree in an earlier suit (*Burke v. Kleiman*, 277 Ill. App. 519). Petitioners rejoined that they were not parties to that suit or bound by its decree, and that denial of their right to litigate in the present suit, the issue of performance of the condition precedent to the validity of the agreement would be a denial of due process of law guaranteed by the Fourteenth Amendment. The petitioners are not the successors in interest or in priority with any of the parties in the earlier suit.

The circuit court found that only about 54 per cent of the frontage owners had signed the agreement and that the only support of the judgment in the *Burke* case, *supra*, was a false and fraudulent stipulation of the parties that 95 per cent had signed. But it ruled that the issue of performance of the condition precedent to the validity of the agreement was *res judicata* as alleged and entered a decree for respondents. The Supreme Court of Illinois affirmed this decision. The Supreme Court of the United States granted *certiorari* to resolve the constitutional question.

The Supreme Court of Illinois found in the *Burke* case, *supra*, that that suit was brought by a landowner in the restricted area to enforce the agreement which had been signed by his predecessor in title, in behalf of herself and other property owners in like situation and that upon stipulation of the parties in that suit that the agreement had been signed by 95 per cent of all the frontage owners and found that the agreement was in force. It found that the stipulation was untrue but held, contrary to the trial court, that it was not fraudulent or collusive.

"From this the Supreme Court of Illinois concluded in the present case that *Burke v. Kleiman* was a 'class' or 'representative' suit and that in such a suit 'where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings'; that petitioners in the present suit were members of the class represented by the plaintiffs in the earlier suit and consequently were bound by its decree which had rendered the issue of performance of the condition precedent to the restrictive agreement *res judicata*, so far as petitioners are concerned.



The court thought that the circumstance that the stipulation in the earlier suit that 95 per cent of the frontage owners had signed the agreement was contrary to the fact as found in the present suit did not militate against this conclusion since the court in the earlier suit had jurisdiction to determine the fact as between the parties before it and that its determination, because of the representative character of the suit, even though erroneous, was binding on petitioners until set aside by a direct attack on the first judgment."

The court in reversing the decision of the Supreme Court of Illinois stated:

\*\*\*\*\*

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U. S. 714; 1 *Freeman on Judgments* (5th ed.), § 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. § 905, 28 U. S. C. § 687, prescribe, *Pennoyer v. Neff*, supra; *Lafayette Ins. Co. v. French*, 18 How. 404; *Hall v. Lanning*, 91 U. S. 160; *Baker v. Baker, E. & Co.*, 242 U. S. 394, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464; *Old Wayne Mut. L. Ass'n. v. McDonough*, 204 U. S. 8.

"To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were made parties to it. *Smith v. Swormstedt*, 16 How. 288; *Royal Arcanum v. Green*, 237 U. S. 531; *Hartford L. Ins. Co. v. Ibs*, 237 U. S. 662; *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356; cf. *Christopher v. Brusselback*, 302 U. S. 500."

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"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, *Plumb v. Goodnow*, 123 U. S. 560; *Confectioners' Machinery Co. v. Racine Engine & Mach. Co.* 163 Fed. 914; 170 Fed. 1021; *Bryant E. Co. v. Marshall*, 169 Fed. 426, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and

those who are absent is such as legally to entitle the former to stand in judgment for the latter. *Smith v. Swornstedt*, supra; cf. *Christopher v. Brusselback*, supra, 503, 504, and cases cited.

"In all such cases so far as it can be said that the members of the class who are present are, by generally recognized rules of law entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit. See *Bernheimer v. Converse*, 206 U. S. 516; *Marin v. Angedahl*, 247 U. S. 142; *Chandler v. Peketz*, 297 U. S. 603. Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. Compare *New England Divisions Case*, 261 U. S. 184, 197; *Taffart v. Bremner*, 236 Fed. 544. We decide only that the procedure and the course of litigation sustained here by the plea of *res judicata* do not satisfy these requirements.

"The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligations of the signers and those claiming under them. The promises ran severally to every other signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. If those who thus seek to secure the benefits of the agreement were rightly regarded by the state Supreme Court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.

"Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because



they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.

"It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. *Smith v. Swormstedt*, supra; *Supreme Tribe of Ben Hur v. Cauble*, supra; *Groves v. Farmers State Bank*, 368 Ill. 35. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. See *Terry v. Bank of Cape Fear*, 20 Fed. 777, 781; *Weidenfeld v. N. Pac. Ry. Co.*, 129 Fed. 305, 310; *McQuillen v. National Cash Register Co.*, 22 F. Supp. 867, 873, aff'd 112 F. (2d) 877, 882; *Brenner v. Title Guarantee & Trust Co.* 276 N. Y. 230; cf. *Wabash R. R. Co. v. Adelbert College*, 208 U. S. 38; *Coe v. Armour Fertilizer Works*, 237 U. S. 413. Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of the absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants. *Tumey v. Ohio*, 273 U. S. 510."

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#### CONSTITUTIONAL LAW - EMINENT DOMAIN

(*Ryan et al. v. Housing Authority of the City of Newark*, et al. \_\_\_\_ N. J. \_\_\_\_, 15 A. (2d) 647)

Whether use is public in nature is a judicial question, but the necessity and expediency of the expropriation of private property are purely legislative concerns and hearing thereon is not essential to "due process."

The Housing Authority of the City of Newark filed a petition to Essex Circuit Court for acquisition of land by eminent domain for the consummation of a "public housing project for families of low income in the City of Newark" undertaken pursuant to grants of power in

Ch. 19 of Session Laws of 1938, (Pamph. L, p. 65; R. S. 14-A-1 et seq., N.J.S.A. 55; 14-A-1 et seq.) and the adoption of a resolution reciting that it "cannot acquire" the lands "by agreement with the owner by reason of disagreement as to price", and directing the institution of condemnation proceedings under R. S. 20:1-30 et seq., as amended and supplemented by Ch. 21 of the Laws of 1938, (Pamph. L, p. 92, N.J.S.A. 20:1-30, 20:1-36) and praying for the appointment of commissioners to settle compensation; and an order was thereupon made appointing a time and place for a hearing thereon. Due notice was given to the land-owners.

The Supreme Court of New Jersey sustained the order and denied writ of certiorari to the landowners, and held that where eminent domain statute provided for assessment of compensation by viewers, subject to an appeal to a court, carrying with it a right to have the matter determined upon a full trial, "due process" does not require a hearing before the viewers, but is satisfied by full hearing that may be obtained by exercising right to appeal.

The court further held, citing the case of *Romano v. Housing Authority*, 123 N.J.L. 428, 10 A. (2d) 181, affirmed 124 N.J.L., 452, 12 A. 2d 384, that the provision in local housing authority law authorizing public housing project for families of low income was not in excess of legislative power and was not arbitrary and unreasonable in the sense that provision had no substantial relation to the declared public use.

#### CONSTITUTIONAL LAW - MORTGAGES

(In re *Riverview Products, Inc.*, District Court, W. D. New York, 34 Fed. Supp. 733).

The Permanent Deficiency Foreclosure Act of New York is constitutional.

The important question which this court decided in affirming the decision of the referee in a bankruptcy case previously decided was whether the Permanent Deficiency Foreclosure Act is constitutional. In holding that it is constitutional the court said:

"The remaining question concerns the constitutionality of Section 1083. It is obvious that the Emergency Acts enacted in 1938 and subsequently thereto were enacted in the fear that Section 1083 might be held to be unconstitutional. The Court of Appeals of the State of New York and the Supreme Court of the United States have sustained the Emergency Mortgage Deficiency Act--1083-a. *Honeyman v. Jacobs*, 306 U. S. 539, 59 S. Ct. 702, 83 L. Ed. 972; *Klinke v. Samuels*, 264 N. Y. 144, 190 N. E. 324; *New York Life Ins. Co. v.*



H. & J. Gutttag Corp. 265 N. Y. 292, 192 N. E. 481; City Bank Farmers' Trust Co. v. Ardlea Incorporation, 267 N. Y. 224, 196 N. E. 34; but neither the Supreme Court nor the Court of Appeals has passed upon the question of the Permanent Deficiency Foreclosure Act--Section 1083. In Tompkins County Trust Co. v. Herrick, 171 Misc. 929, 13 N. Y. S. 2d 825, the facts are comparable to those here presented. It was there held that Section 1083 was constitutional. In Home Owners' Loan Corp. v. Margolis, Supreme Court, Westchester Co., 168 Misc. 945, 6 N. Y. S. 2d 432, it was held that the statute was unconstitutional.

"Certain language of the United States Supreme Court in *Honeyman v. Jacobs*, supra, is applicable to Section 1083 as well as to Section 1083-a. I refer in particular to the following quotations from the decision:

"Appellant invokes the principle that the obligation of a contract is impaired by subsequent legislation which under the form of modifying the remedy impairs substantial rights. \*\*\* As we said in *Richmond Mortgage (& Loan) Corp. v. Wachovia Bank (& Trust Co.)* 300 U. S. 124, 128, 57 S. Ct. 338, 339, 81 L. Ed. 552, 108 A.L.R. 386, 'The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right.' \*\*\* The mortgage was executed to secure payment of that indebtedness. The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit. \*\*\*

"Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there was any constitutional sanction for such a provision which precluded the legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt. \*\*\*

"In this control over the foreclosure sale under its decree, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would thus realize upon the mortgage debt if the sale were confirmed.' (306 U. S. 539, 59 S. Ct. 703, 83 L. Ed. 972.)

"So interpreting this language, it seems to me that Section 1083 must be held to be constitutional."

CONDITIONAL SALES - ASSIGNMENT OF CONTRACT

(C.C.A. 9: United States v. Troy-Parisian, Inc., Oct. 30, 1940, U.S.L.W. 2291)

Purchaser under conditional sales contract providing that seller may assign contract without notice and free from any defense is precluded from asserting defense of breach of implied warranty against Federal Housing Administrator, successor to assignee's rights.

The contract and an installment note executed for the purchase price were assigned to a bank which was insured against loss by reason of nonpayment pursuant to the National Housing Act (48 Stat. 2346, 12 U.S.C. Sec. 1703, Title I, Sec. 2). Upon the purchaser's refusal to pay, the bank demanded and received payment from the Federal Housing Administration.

The administrator, as transferee of the note and contract, sued the purchaser and the trial court entered judgment in its favor. The judgment is reversed.

"Since the parties might originally have put their contract in negotiable form, there would appear to be no good reason why they may not by agreement impart to it limited elements of negotiability. \*\*\*

"[An Idaho statute (Sec. 5-302 Idaho Code 1932)] provides that 'in case of an assignment of a thing in action, the action by the assignee is without prejudice of any set-off, or other defense existing at the time of, or before notice of the assignment.' In Pacific Acceptance Corp. v. Whelan, 43 Idaho 15, 243 P. 444, the Idaho Court called attention to this statute in holding that a clause of the sort involved here did not preclude the defense of fraud or total want of consideration. \*\*\*

"We think the view we have taken is not out of harmony with the decision of the Idaho court in the Whelan case. Here there is no suggestion of fraud nor was there want of consideration in the inception of the contract. No more is involved than a breach of implied warranty resulting in a failure of consideration as to one of several items included in the sale. For its damages in this respect appellee has its action against the seller."



COURTS

(HOLC vs. Russell Kahl, District Court of the United States for the Southern District of Indiana, New Albany Division. Decided in October 1940.)

Suit to evict tenant from realty valued at more than \$3,000 and to recover \$100 for its wrongful detention does not involve jurisdictional amount to entitle HOLC to institute it in Federal court, but when defendant counterclaimed for \$8,000 damages, HOLC held entitled to remove to Federal Court.

HOLC instituted suit in the Circuit Court of Floyd County, Indiana, to evict its tenant, Russell Kahl, and also seeking to recover \$100 for the wrongful detention of the realty, the value of which was approximately \$5,000. Mr. Kahl filed his answer of general denial and also a set-off or counterclaim seeking to recover from HOLC \$8,000 as damages sustained by him as the result of the alleged treatment of the realty for termites. HOLC then removed the case to the District Court of the United States for the Southern District of Indiana, New Albany Division. Mr. Kahl filed a motion to remand. He contended that since the value of the realty was more than \$3,000, HOLC could have instituted its suit in the District Court of the United States and that having instituted its suit in the Circuit Court of Floyd County, Indiana, it had made an election or choice of courts which it could not later repudiate by removing the case to the District Court of the United States.

The District Court of the United States overruled Kahl's motion to remand, the decision evidently being based upon the ground that although the value of the realty exceeded \$3,000, the eviction suit instituted by HOLC nevertheless did not involve the jurisdictional amount of \$3,000 which would have entitled HOLC to institute the suit in the Federal Court under U.S.C.A., Sections 41 and 42. The court manifestly was of the opinion that the amount in controversy in the litigation did not exceed, exclusive of interest and costs, the sum or value of \$3,000 until Kahl counterclaimed for \$8,000 damages alleged to have been sustained by him as the result of the claimed negligent treatment of the property for termites.

COURTS - APPEAL AND ERROR

(Lester K. Sweeny v. HOLC, Supreme Judicial Court of Massachusetts. Decided November 1940.)

The statute of Massachusetts vests discretion in trial courts as to whether to permit a suit in equity to be changed into an action at law, and trial court will not be reversed unless discretion abused. - Finding of facts and order denying motion to have allowed nunc pro tunc the transcript of the evidence at the hearing incorporated in the record of the case for appeal are judicial acts neither interlocutory nor final and can not be appealed from.

HOLC foreclosed, by the exercise of power of sale, a mortgage executed to it by Elizabeth E. Sweeny. Immediately thereafter, Lester K. Sweeny filed against HOLC a suit in equity claiming that he had possession and title by adverse possession of the property involved and praying that the title and right to possession be adjudged in him and protected by injunction. HOLC answered and then plaintiff Sweeney filed a motion to change the suit in equity into an action at law under a statute of Massachusetts as follows:

"The supreme judicial or the superior court may, before final judgment and upon terms, allow an amendment changing an action at law into a suit in equity or a suit in equity into an action at law if it is necessary to enable the plaintiff to sustain the action or suit for the cause for which it was intended to be brought. The court in which the amendment is allowed may retain jurisdiction of the cause as amended."

On April 10, 1940, the court overruled plaintiff's motion to amend his suit in equity into an action at law and ordered the cause to be placed on the April Jury-Waived Merit List for hearing on the merits. From this interlocutory decree or order the plaintiff entered an appeal. The case was heard by the trial court on the merits on April 24, 1940, and a finding of facts was made by the Court that plaintiff had no interest of any kind, either in law or in equity, in the property and had never had any interest in it; that plaintiff's mother had acquired the property in 1934 and had mortgaged it to HOLC; and that on September 25, 1939, HOLC had properly foreclosed its mortgage. On this finding of facts, final decree was entered dismissing the case, and on May 14, 1940, plaintiff entered an appeal. On June 10, 1940, plaintiff filed a motion "to have allowed nunc pro tunc the transcript of the evidence at the hearing, incorporated in the record of the case for plaintiff's appeal." This motion was denied by the Court, and on June 24, 1940, plaintiff filed an appeal from the order of the Court denying this motion.



The Supreme Judicial Court of Massachusetts on the appeal held that under the above quoted statute the allowance of an amendment changing a suit in equity into an action at law was discretionary with the trial court and that there was nothing in the record to indicate that the trial court had abused its discretion in refusing to permit the change. It also held that the trial court had not erred in putting the case on the April Jury-Waived Merit List for hearing on the merits although neither party had requested that this be done. In this latter connection the Court said:

"The action of the judge was an exercise of an inherent power of courts. In this court for example parties have no part in placing cases on the list for hearing by the full court. Rules of court enabling parties to place cases upon a trial list do not by implication deprive a court of its inherent power."

The Supreme Judicial Court further held that plaintiff could not appeal from the finding of facts nor from the order denying the motion to incorporate in the record on appeal a transcript of the evidence, because there were judicial acts that were neither interlocutory nor final decrees, citing *Carilli vs. Hersey*, 303 Mass. 82, 87, and *Bolster vs. The Attorney General*, Mass. Adv. Sheets (1940) 1155, 1156.

There being no evidence in the record on appeal and the finding of facts, supporting as it did the final decree of the trial court dismissing the case, the final decree of the trial dismissing the case at the cost of the plaintiff was affirmed.

#### COVENANTS - RECIPROCAL NEGATIVE EASEMENTS

(*Denhardt v. De Roo* --- Mich. ---, 294 N. W. 163)

A reciprocal negative easement runs with the land. It originates for a mutual benefit, starts with a common owner, and is never retroactive.

This was a bill in equity to enforce a claimed reciprocal negative easement. Plaintiffs owned some lots in a subdivision upon which defendant also owned two lots. The original owners, a mother and two sons, partitioned all the lots in the subdivision so that the mother and one son each owned 25 of the 74 lots and the other son owned 24 lots. The lots which each one owned were not arranged in any order but were spread out all over the subdivision. One of the sons transferred the two lots, without any restriction, which defendants now own. Some time later he conveyed another lot near these two which contained a restriction limiting the lot to residence purposes and that any dwelling erected thereon shall cost not less than

three thousand dollars, etc. One other lot that he owned was conveyed some time later with a restriction as above, but that the residence erected thereon should cost not less than two thousand dollars. None of the conveyances by the mother and the other son contained any restrictions.

From the facts it appeared that there were no restrictions as of record. Business places were found to be near residences. Defendant contemplated building a one-story building in which was to be operated a grocery and meat business. It was conceded that there were no express restrictions in the plat or in the deeds which formed the chain of title to defendant. The trial court granted the relief prayed for on the ground that the express restrictions in the deeds to the lots mentioned above, and the references to restrictions "of record" or which "run with the land" (which were found to be untrue) in other deeds subjected the two lots of plaintiff to a reciprocal negative easement. The Supreme Court in finding that there was no reciprocal negative easement said:

"The principles applicable to the rule of 'reciprocal negative easement' were classically stated by Mr. Justice Wiest in *Sanborn v. McLean*, 233 Mich. 227, 205 N. W. 496, 497, 60 A.L.R. 1212: 'If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land, subject to its affirmative or negative mandates. It originates for mutual benefit and exists with vigor sufficient to work its ends. It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restriction must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan.'

"The burden of establishing the restrictions by way of reciprocal negative easement is on plaintiffs. *Fenwick v. Leonard*, 255 Mich. 85, 237 N.W. 381; *Grant v. Cragie*, 292 Mich. 658, 291 N.W. 44.



"'Courts of equity do not aid one man to restrict another in the use to which he may put his property unless the right to such aid is clear.' Casterton v. Plotkin, 188 Mich. 333, 154 N.W. 151,155.

"It has been said that only under unusual circumstances will the use of property be restricted other than by provisions in the conveyance on which the title rests. Miller v. Ettinger, 235 Mich. 527, 209 N.W. 568; Kime v. Dunitz, 249 Mich. 588, 229 N.W. 477. Where there is no express restriction in the chain of title of the particular lot the use of which is sought to be restricted, there must be proof of a 'scheme of restrictions' originating from a common owner.

\*\*\* A restriction placed in the title to a single lot does not establish such a plan. Taylor v. State Highway Commissioner, supra. The general plan must have been 'maintained from its inception,' and 'understood, accepted, relied on, and acted upon by all in interest.'

\*\*\* The scheme must have its origin in a common grantor: 'it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan.' \*\*\* Plaintiffs have failed to produce evidence tending to establish a plan founded by the common grantor. \*\*\* "

#### HOMESTEAD

(Bank of Cruger v. Hodge, ---Miss.---, 198 So. 26)

A homestead exemption will not be allowed in a case where a removal by a family has been made and where the intention to return has been shown to be for a indefinite period of time, because the statute allows only a removal which may be justly adjudged as temporary and it requires a speedy return as soon as the cause of absence can be removed.

Defendant owned some land which was occupied by her husband and two daughters as their homestead during the years 1931 and 1932. They moved from this place at the end of 1932 to a town where the husband could get employment and make a living. For several years they moved about from town to town wherever the husband could get employment.

In 1937 appellant obtained a judgment against appellee and her husband and finally it was advertised to be sold on June 1, 1939. A few days prior to the date of the sale appellee moved some of the furniture from the nearby town where they were living into the house on the land in question and thereafter appellee and one of her daughters spent one or two nights every week-end at the residence, but during the week remained in the city where the husband was employed.

The appellee contended that she had never abandoned her homestead, but that her removal in 1932 was temporary, if indefinite, by reason of economic conditions, and that they had always intended to return to the homestead.

The court in reversing the decision of the lower court and denying the right of appellee to claim the property as a homestead said:

" \*\*\* Their testimony is to the effect, however, that their intention to return was when they had been able to make enough money, in employment away from the homestead, to buy the necessary farming equipment and to maintain themselves on the farm homestead; that during the seven years absence they had not been able to do this, and throughout the testimony there is no indication when, or whether ever, they will be so able. The statute allows only a removal which may be justly adjudged as temporary and requires a speedy return as soon as the cause of the absence can be removed; but according to the testimony, the obstacle in the way of a speedy return may never be removed. The case is controlled, therefore, by the rule as reviewed in *Bank of Hattiesburg v. Mollere*, 118 Miss. 154, 79 So. 87, with the result that it must be held that there was an abandonment of the homestead.

"Appellee relies as her second contention on the long line of cases in this state beginning with *Trotter v. Dobbs*, 38 Miss. 193, to the effect that a judgment debtor may successfully interpose his claim of exemption as against the execution creditor at any time before sale under the execution if the debtor has actually gone into the occupancy or reoccupancy of the land as a homestead at the time of the sale. In order to avail of that rule, the premises being already habitable, the occupancy must be such as will stamp the place claimed as a homestead with the character then and there of an actual and permanent residence of the debtor and his family, and it is not sufficient that it has been made a mere part-time lodging place, while the real residence of the family remains elsewhere, as the testimony shows was the case here."

Justice Ethridge rendered a dissenting opinion.

HOMESTEAD - HUSBAND AND WIFE

(*Bigelow et al. v. Dunphe*, \_\_\_\_ Fla. \_\_\_\_, 198 So. 13)

Under the Florida Constitution a married woman may be the "head of a family" even though the husband is living, and as such may have homestead exemption rights in realty owned by her upon which she and her husband and family live.



"The Constitution contemplates that a married woman may be the head of a family residing in this State even though the husband is living, if the wife is in fact the head of the family; and as such head of a family she may have homestead exemption rights, under Section 1, Article X of the Florida Constitution, in real estate owned by her upon which she lives with her husband and her children as their family home; and though she owns the home place and is a 'free dealer' under the statute, she cannot legally convey or mortgage such home place unless her husband joins her in the execution of such conveyance or mortgage as required by Section 4, Article X, Constitution, if she is, when the conveyance or mortgage is executed by her, the head of the family residing with the family on such home place in this State. Husband and wife may constitute a family under the homestead article of the Constitution. If there be a presumption of fact that the husband if living is the head of the family, such presumption does not relieve a mortgagee or grantee of the duty to ascertain the rights of those occupying real estate that is being conveyed or mortgaged."

#### MORTGAGES - ADVERSE POSSESSION

(Blalock v. Webb et al, \_\_\_ Ga. \_\_\_, 10 S. E. 2d 747)

A devise of land under a duly recorded will is color of title, and adverse possession thereunder for a period of seven years ripens into a prescriptive title that is superior to the title of a grantee in a security deed executed by the testator.

Plaintiff brought suit in ejectment against defendants and the executors of the estate of W. T. Sims seeking to recover some land known as the home place of said Sims. Action was based on a deed to secure a debt dated January 4, 1897. The defendant executors answered, alleging that on November 4, 1913, after due advertisement all of the real estate of Sims, deceased, was sold to pay debts except the property herein mentioned which was devised to the wife and children of Sims. The other defendants denied the plaintiff's claim of title or right of possession claiming the property involved by virtue of more than seven years' adverse possession thereof under the will, as color of title; also claiming title by prescription by virtue of their adverse possession for more than twenty years and alleging improvements in the amount of \$10,000.

On the trial the plaintiff introduced in evidence the security deed dated January 4, 1897, from Sims together with the notes. The defendants introduced in evidence the will of Sims, which contained an item devising to the defendants the property here involved.

The will was duly probated and recorded and after the death of the testator the legatees took possession of the land and have remained in continuous, open, and adverse possession thereof and paying taxes, etc. From a directed verdict for defendants the plaintiff appealed. The court in upholding the decision of the lower court said:

"A controlling question presented by the record is whether or not the devise in the will constitutes color of title which will ripen by prescription when adverse possession has been held thereunder for the statutory period of seven years. Code, § 85-407. A solution of this question involves in the present case a determination of the incidental question as to whether the legatees can hold adversely to the grantee in a security deed previously executed by their testator. It is obvious that if the devise is color of title, bona fide possession thereunder for a period of seven years will ripen into perfect title as against every one. The very purpose of the law in providing for prescriptive title is to extinguish the claims of all others in the land. If such adverse possession ripened into title that was good only as against those having no claim to the land, the law would be useless and could serve no purpose. The manifest purpose of the law is to establish title that is good against all legal and legitimate rights and title formerly held by others, but forfeited by reason of adverse possession. Whether such rights be founded upon a mere lien such as a mortgage, upon title for a limited purpose such as a security deed, or upon an absolute and unconditional title, makes no difference. This is not an unfair or harsh rule of law. Those having an interest are given seven years in which to act to protect their interest. The statute puts them on notice in advance of the result if they fail to act. Thus it is seen that where title is acquired by prescription, those having an interest which is forfeited have virtually sanctioned the forfeiture and have aided in the establishment of prescriptive title by their inaction. In *Harriss v. Howard*, 126 Ga. 325(2), 55, S.E. 59, this court said: 'A devise of land under a will duly recorded may give color of title.' Then, in *Caraker v. Brown*, 152 Ga. 677, 111 S.E. 51, this court held that a devise under a will was color of title, and that the legatees thereunder could hold adversely to the grantee of their testator. This court in that case went further than the facts in the present case require us to go. It was there held that the executor, the legatee, and the grantee of the legatee could all hold adversely to a grantee of the testator; and it was held that the possession of the executor could be tacked to that of the vendee of the devisee, to make out the necessary period of prescription. It follows that the defendant legatee and heirs of legatees in the present case, whom the evidence shows knew nothing of the existence of the plaintiff's claim until the present suit was filed, and who have held possession of the premises involved under the devise for more than seven years, acquired title by prescription, and that the evidence demanded the verdict in their favor."



MORTGAGES - DEFICIENCY JUDGMENT

(Donaldson v. Henry et al, \_\_\_ Idaho \_\_\_, 105 Pac. 2d 731).  
A decree of foreclosure of a mortgage is not a personal judgment. A deficiency judgment will fail when it fails to designate any defendant as being personally liable.

The respondents, Henry and wife, executed and delivered to Anna E. Donaldson a real estate mortgage to secure payment of \$1,500. Henry and wife thereafter sold the property to respondents Severns and wife, who assumed and promised to pay said mortgage debt. Thereafter Anna E. Donaldson foreclosed the mortgage and asked for judgment and execution against defendants (Henry and Severn) for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of the judgment. Defendants were personally served and defaulted. Sale was had and there remained a deficiency. However, the sheriff's return merely showed the amount of the deficiency but nothing to indicate against whom the deficiency was.

The court entered an ex parte order staying execution on the deficiency, stating in part as follows: "and whereas the court entertains grave doubt as to the validity of said Deficiency Judgment, it is ordered that execution of said deficiency judgment be stayed until further order of the Court."

On motion of the plaintiff the court set aside this order staying execution and issued an order vacating same. However, since these motions and orders were without notice they were held a nullity.

Anna E. Donaldson assigned the deficiency judgment to J. L. Donaldson, appellant herein. The defendants filed with the court a motion to vacate the deficiency judgment reciting among other things "That said Decree of Foreclosure fails to determine the person or persons who were personally liable for the debt" and "That said Decree fails to name the defendants against whom the Deficiency Judgment should be docketed." The court ordered the deficiency judgment vacated and set aside on the ground that said judgment was "void on the face of the judgment roll on the grounds stated in said motion." An appeal was taken from this order and which was affirmed by the Supreme Court of Idaho which stated:

"Section 9-101, I. C. A., provides for foreclosure and sale and that 'if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt.'

"Under such statutory provision the decree originally or after return of sale must determine who is personally liable for the debt and without such an adjudication there is no legal basis for a deficiency judgment. *Herd v. Tuohy*, 133 Cal. 55, 65 P. 139; *Leviston v. Swan*, 33 Cal. 480; *Scamman v. Bonslett*, 118 Cal. 93, 50 P. 272, 62 Am. St. Rep. 226; *Ewing v. Richvale Land Co.*, 37 Cal. App. 53, 172 P. 645; *Ridgley v. Abbott Quicksilver Mining Co.*, 146 Cal. xviii, 79 P. 833. The record in the case at bar contains no deficiency decree of any kind and the decree of foreclosure of the mortgage not only fails to specifically adjudicate a personal liability in express terms, but it fails entirely to designate any defendant personally liable or decree anything but a simple foreclosure, without rendering judgment for any amount against anyone. A recital that there is a sum certain 'owing and unpaid to the plaintiff from the said defendants,' and ordering the foreclosure of the mortgage given to secure the payment thereof, is insufficient. 'A decree of foreclosure of a mortgage is in no sense a personal judgment' (*Perkins v. Bundy*, 42 Idaho 560, 565, 247 P. 751, 752), and the concluding paragraph of the decree that 'in the event the said premises fail to bring sufficient on the said sheriff's sale to discharge the mortgage debt aforesaid with the costs and expenses of sale, that deficiency judgment be docketed herein in conformity with law and the practice of this court,' adds nothing in support of personal liability. \*\*\*

"Appellant cites *Ewing v. Richvale Land Co.*, supra, and 18 Cal. Jur. Sec. 729, pages 495, 496, as sustaining the efficacy of this decree as awarding a deficiency judgment. In the first the findings stated: 'It is hereby ordered, adjudged, and decreed that a judgment be entered against the defendant Richvale Land Company in the sum of \$4,593, with interest at the rate of 10 per cent per annum \*\*\*.' /37 Cal. App. 53, 172 P. 646./

"The text of the second citation states: 'Under the statute a deficiency judgment may be docketed by the clerk only against the defendant or defendants personally liable for the debt. Since the docketing of the judgment is a proceeding ministerial in character, it follows that the judgment must determine who is personally liable for the debt, and that without such an adjudication, the clerk has no authority to docket a deficiency judgment. It is not necessary that the judgment shall in express terms state that the defendant is personally liable for the debt; it being sufficient, it has been said, if the fact clearly appears from the findings and judgment. A judgment is insufficient in this respect where it contains a mere recital of the fact or finding which is not followed by an adjudication of personal liability. But where the recital is followed by a distinct adjudication and judgment against a designated person in a specified amount, there is a sufficient adjudication of personal liability.'



The personal liability is determined where it is adjudged that the defendant is liable for any money that may be necessary to make up the deficiency between the amount **realized** on the sale of the property and the mortgage debt."

"The decree herein is thus by these authorities fatally defective."

#### MORTGAGES - NOTES

(Federal Land Bank of Omaha v. Schley et al., \_\_\_ S. D. \_\_\_, 293 N. W. 879).

A suit can be brought on a note without first foreclosing mortgage or waiving the security, in a case where the note which was secured by a realty mortgage which was not given in payment of purchase price of the realty, provided that the separate estate of each maker should be bound for its payment.

The defendants (husband and wife) obtained a loan from the plaintiff and executed a promissory note which expressly bound the separate estate of each maker, for the payment of same. A mortgage on real estate owned by the defendants was given as security. Upon default in the payment of installments on the note plaintiff brought suit against defendants. The defendant (wife) made application to the Circuit Court that the suit upon the promissory note at law be abated until the plaintiff had exhausted its remedy against the security. An order to show cause was issued requiring the plaintiff to appear before the court and show why the action should not be abated until the plaintiff had realized upon the security for the note sued upon. Plaintiff resisted defendant's application and the Circuit Court ordered "That all proceedings in the action be stayed until the plaintiff herein shall foreclose upon the land which is security for the debt sued upon herein, or has waived its security to said land." The plaintiff appealed from this order.

The appellant contended that under the statutes of the State of South Dakota that it can, at its election as a holder of a promissory note, sue at law in the first instance, and that it is not necessary to bring proceedings to foreclose the mortgage, and that it does not waive its rights under the mortgage securing the debt by bringing a suit for judgment upon the promissory note. The court upheld appellant's contention and in reversing the decision of the Circuit Court said:

" \*\*\* There is considerable force to appellant's argument that there would be no purpose of enacting the foregoing sections if a suit at law could not be maintained prior to the foreclosure of a mortgage and that such remedy does not exist. We are not of the opinion that this lawful owner and holder of a promissory note such as this, containing no restrictions, cannot bring a suit for judgment thereon. The foregoing sections give full support to the theory that an independent action at law may be maintained without interference by our courts. It would be senseless to enact into law the foregoing sections restraining the commencement of foreclosure until the remedy at law had been exhausted to the extent prescribed therein if no suit could be maintained upon the promissory note.

"Under the decisions of our court it appears that a mortgagee may sue on the indebtedness without foreclosing the mortgage. Hampe et al. v. Manke et al., 28 S. D. 501, 134 N. W. 60; Bennett v. Ellis et al., 13 S. D. 401, 83 N. W. 429.

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"We briefly allude to the promissory note upon which the appellant brought suit and it would seem that some force and effect must be given to the language therein which states that 'the separate estate of each maker is hereby expressly bound for the payment of this note.' That, in our opinion, permits the interpretation of our statutes, that a suit may be brought upon a promissory note for recovery thereon without exercising the option to foreclose the mortgaged property. We find no language in this note to the effect that the mortgaged property shall be primarily liable for the debt. The statement binding the separate estate of each maker for the payment of the note, we feel, grants to the holder of the note a right of action and deprives the respondent of successfully insisting in this action that the appellant must first exhaust the mortgaged property."

MORTGAGES - RELEASE AND DISCHARGE - DAMAGES FOR REFUSING  
(Cyril Duffin v. HOLC, District Court, Salt Lake County, Utah. Decided in November 1940.)

By statute in Utah a mortgagee who wrongfully refused to release and discharge his mortgage can be held liable for damages of mortgagor in being compelled to employ counsel to bring suit to discharge and release the mortgage although he cannot be held liable for the plaintiff's attorney's fee as such.

In a condemnation proceeding the Court, intending to pay the mortgage indebtedness in full, directed its clerk to pay to HOLC from the award which had been paid into the registry of the Court by the condemnor, the sum of \$3853.40 in full of its interest in the property,



a portion of which was condemned and upon which it held a mortgage executed by the owner, and to pay the balance of the award to the owner. HOLC was not advised of the entry of this order and therefore did not receive the \$3833.40 until an additional \$11.02 of interest had accrued on the mortgage indebtedness. It also discovered at, or shortly after, the time it received the \$3833.40 that an insurance advance of \$15.50 had not been taken into consideration by the Court in computing the amount to be paid to it. The result was that the amount allowed by the Court and paid by the clerk lacked \$26.52 of paying in full its mortgage indebtedness against the property. By motions, HOLC endeavored to have the Court in the condemnation proceeding amend the payout order so that it might receive the full amount of its mortgage indebtedness, including the insurance advance and interest, but to no avail.

The owner and mortgagor to HOLC, Duffin, demanded of HOLC that it release and discharge of record the lien of its mortgage and return an abstract which he had placed in its possession. This, HOLC refused to do without the payment of the \$11.02 of accrued interest and the insurance advance of \$15.50. Duffin then sued HOLC to require it to release and discharge its mortgage, for \$115 damages for conversion of the abstract, and for \$700 of alleged damages sustained by him as the result of the refusal of HOLC to release and discharge of record the lien of its mortgage, the suit in the latter aspect being under a statute of Utah allowing damages for the wrongful refusal of a mortgagee to release and discharge of record the lien of a mortgage. Duffin alleged that he had sustained \$500 damages because of his inability to operate the remaining portion of his property as a tourist park, which inability he averred resulted from the refusal of HOLC to release and discharge the lien of its mortgage. He also alleged that he had sustained damages to the extent of \$200 as a result of his having to bring suit to require HOLC to release and discharge its mortgage, the damage consisting primarily of his attorney's fee

At the trial the Court held that the adjudication in the condemnation proceeding fixing the amount of the mortgage indebtedness and the amount HOLC was entitled to receive at \$3833.40 was res judicata, final and binding on HOLC and that it was not entitled to demand of Duffin that he pay the additional \$26.52 in order to obtain a release and discharge of the mortgage. It therefore held that HOLC had wrongfully refused to release and discharge the mortgage, and it ordered that HOLC release and discharge the same. The Court then held that HOLC had not converted the abstract, its refusal to return the abstract having been a qualified refusal not sufficient to support an action for damages for conversion.

The Court held that plaintiff had failed to prove and was not entitled to recover any damages alleged to have resulted from

his inability to operate the tourist park. The Court, however, allowed plaintiff a recovery of \$150 as damages caused by his being compelled to employ counsel to bring suit to require the discharge and release of the mortgage. The Court recognized the fact that the \$150 was the fee plaintiff had paid his attorney for bringing the suit, but it cited as authority for allowing the \$150 recovery the case of *Swaner v. Union Mortgage Company*, 105 Pac. (2d) 342, decided by the Supreme Court of Utah on September 13, 1940, distinguishing the earlier case of *Openshaw v. Halpin*, 24 Utah 426, 68 Pac. 138, and holding that such a recovery is for damages and not for attorney's fees as such.

MUNICIPAL CORPORATIONS - PROHIBITION - DAMAGES

(*Woodworth et al. v. Gallman et al.*, ---S. C. ---, 10 S. E. (2d) 316)

A writ of prohibition will be granted by court where other remedies are inadequate. The expenditure of public funds for slum clearance under the South Carolina State Housing law is proper. Governmental competition with owners of private business does not constitute legal damage even though it injures their business.

Where speedy determination of suit to enjoin functioning of the Housing Authority of the City of Spartanburg was required to prevent injustice and irreparable injury and remedy by appeal from the Court of Common Pleas was inadequate, the Supreme Court of South Carolina granted a writ of prohibition and assumed original jurisdiction and held:

(a) That the Housing Authority of the City of Spartanburg was properly organized and the members thereof were properly appointed;

(b) That a petition in a suit to enjoin local housing authority from performing co-operative agreements was demurrable where challenged acts and proceedings occurred prior to enactment of statute validating acts and proceedings of housing authority (Act March 21, 1939, § 1, 41 St. at Large, p. 690.); and

(c) That under statute vesting in the housing authority all powers necessary to effectuate the provisions of statute, local housing authority had power to select the site for housing project which it was authorized to acquire by purchase, lease, eminent domain, or otherwise, notwithstanding site chosen was contrary to recommendations of superintendent of city schools, since proximity of the project to school facilities was only one of the factors entering into selection of site. (Act March 19, 1934, § 3, 38 St. at Large, § 1372.)



MUNICIPAL CORPORATIONS - ZONING

(W. B. Gibson Co. v. Warren Metropolitan Housing Authority et al., --- Ohio ---, 29 N. E. (2d) 236)

A provision in a contract between a private corporation and a housing authority that, in event certain site was not rezoned by the time mentioned in the contract or any extension thereof, then the contract should be void, canceled, and of no effect, was a condition precedent to the liability of the housing authority on the contract.

The Court of Appeals, Trumbull County, Ohio, in sustaining a declaratory judgment of the Court of Common Pleas of Trumbull County, held that:

(a) A provision in a contract between a private corporation and a housing authority that, in event certain site was not rezoned by the time mentioned in the contract or any extension thereof, then the contract should be void, canceled, and of no effect, was a condition precedent to the liability of the housing authority on the contract.

(b) The proper and necessary procedure for rezoning land in a municipal corporation is by ordinance passed by the legislative body of the municipal government.

(c) An agreement on part of city to co-operate with housing authority in certain respects and to plan or replan, zone or rezone, area in city, was merely a "resolution" to rezone and cooperate with the housing authority, and was not a rezoning "ordinance", and hence a rezoning ordinance subsequently passed was not prevented from being subject to referendum under statute providing that a referendum shall apply only to the first ordinance. Gen. Code, § 4227-3; Const. Art. 2, § 1f.

MUNICIPAL CORPORATIONS - ZONING

(Brown v. Village of Owego, Supreme Court, Appellate Division, Third Department, 21 N. Y. S. (2d) 905).

Special hardship to an individual property owner resulting from the enforcement of a zoning ordinance must at times be suffered for the general welfare, but neither the legislature nor the local authorities acting under power delegated by the Legislature, may impose such special hardship unnecessarily and unreasonably. The dominant design of any zoning act is to promote the general welfare. Classification of property for municipal zoning purposes is a matter for legislative rather than judicial action.

"This is an appeal from a declaratory judgment in favor of the plaintiff and against the defendant holding that the zoning ordinance is unconstitutional and void and declaring that the same is confiscatory, arbitrary and unreasonable and constitutes the taking of the plaintiff's property without due process of law and in violation of the provisions of the New York State and Federal Constitutions, art. 1, section 6, and Amend. 14, and that the ordinance, so far as it affects the plaintiff, the character and use of her property, bears no substantial relations to the public health, safety, morals, or general welfare, or to any of the purposes to which such ordinance may be adopted as specified in Section 175 of the Village Law.

"The judgment further decrees that the ordinance is ineffective as restricting the use of the property of the plaintiff or her successors in title, and that she or her successors in title may use said property for any purpose for which it may have been used before the passage of the ordinance."

A petition was filed by plaintiff requesting an amendment or change of the zoning ordinance so as to permit her to use her property for a gasoline service station, etc. The Zoning Commission refused to amend the ordinance after going through regular legal formalities. The property of the plaintiff is restricted to residential properties under the zoning ordinance.

The appellate court reversed the decision of the lower court and said:

"It is conceded that the original ordinance and the one which affects the property of the plaintiff was prepared, passed and published and became a legal ordinance and therefore, the presumption is that it was a valid ordinance and constitutional. It has been enforced for many years and has never been questioned. *City of Rochester v. Macauley-Fien Milling Co.*, 199 N. Y. 207, 92 N. E. 641, 32 L.R.A., N.S., 554; *Stubbe v. Adamson*, 220 N. Y. 459, 116 N. E. 372; *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016.

"On the contention that an ordinance is in fact unreasonable and void as applied to the property of the plaintiff, the plaintiff has the burden of proof. *Heimerle v. Village of Bronxville*, 168 Misc. 783, 5 N.Y.S. 2d 1002.

"The plaintiff in this action did not take the steps that she might have taken to secure a variation of the ordinance on the ground that the ordinance created unnecessary hardships to her particular property but proceeded to commence an action on the ground that



the entire ordinance was invalid and unconstitutional. *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 15 N. E. 2d 587, 117 A.L.R. 1110."

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"The zoning ordinance in question was in accordance with a well considered plan applying to the entire village; it applied a standard plan by which all similarly situated were assumed to be treated alike."

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"Residential districts into which business must not be entered must have definite boundaries and the Legislature has left to the local authorities the decision of where these boundaries shall be placed 'for the purpose of promoting the health, safety, morals, or the general welfare of the community. \*\*\*

"'Special hardship to an individual owner must at times be suffered for the general welfare, but neither the Legislature nor the local authorities acting under power delegated by the Legislature, may impose such special hardship unnecessarily and unreasonably. Such special hardships may at times be avoided or mitigated by a special variation of a general zoning regulation' *Dowsey v. Village of Kensington*, 257 N. Y. 221, 177 N. E. 427, 429, 86 A.L.R. 642.

"The plaintiff in this case has not seen fit to apply for such variation.

"The plaintiff has failed to show that the ordinance was unreasonable or that it caused the plaintiff unreasonable hardship. She has shown that if she could have the ordinance removed she could sell her property for a proposed gas station for much more than it is worth as a residence but that fact does not tend to show that the ordinance is unreasonable; it fails to take into account the danger that such a course would be to the children attending the public school near by.

"The plaintiff offered proof of violations of the zoning ordinance in the whole village. The record is not clear as to how many of these so called violations existed before the passage of the ordinance. A violation of the ordinance cannot be used by the plaintiff as the basis for finding that the ordinance is invalid as the question is not whether some one else has been favored but whether the petitioner has been illegally oppressed. *Joyce v. Dobson*, 255 App. Div. 348, 8 N.Y.S. 2d 768; *Village of North Pelham v. Ohliger et al.*, 216 App. Div. 728, 214 N.Y.S. 253; *Kraft v. Village of Hastings-on-Hudson*, 258 App. Div. 1060, 17 N.Y.S. 2d 630.

"In *Young Women's Hebrew Ass'n. v. Board of Standards and Appeals of City of New York*, 266 N. Y. 270, at page 276, 194 N. E. 751, at page 753 it is held: 'The dominant design of any zoning act is to promote the general welfare.' \*\*\* The stability of the neighborhood and the protection of property of others in the vicinity are important considerations. The financial situation or pecuniary hardship of a single owner affords no adequate ground for putting forth this extraordinary power affecting other property owners as well as the public.'

"'The financial situation or pecuniary hardship of a single owner does not warrant the exercise of the power thus to affect the property of other owners and the public generally. \*\*\* Classification of property for municipal zoning purposes is matter for legislative, rather than judicial, action.' *Matter of Ward v. Murdock*, 247 App. Div. 808, 286 N.Y.S. 280, 281; *Stillman v. Board of Standards and Appeals of City of New York*, 222 App. Div. 19, 225 N.Y.S. 402, affirmed in 247 N. Y. 599, 161 N. E. 197; *McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 414, L.R.A. 1915D, 603."

#### NUISANCES

(*Edith Lee Rosenberg, by guardian, etc. v. HOLC*, City Court, City of New York, County of Kings. Decided November 13, 1940.)

Doctrine of attractive nuisance has no application to ordinary residence property that is vacant and boarded up even though trespassing children may frequently play in the yard of the property.

In a suit against HOLC for damages for personal injuries sustained by a ten-year-old child on the premises of a property owned by HOLC in Brooklyn, New York, the plaintiff relied upon the doctrine of attractive nuisance. The property was a two-and-one-half story, three-family dwelling with a three-car garage in the rear. At the time of the accident and during several months prior thereto the property was vacant and its windows were boarded up. The plaintiff lived on the opposite side of the street from the property, and at the time of the accident she and some other children were playing "hide-and-go-seek" in the grounds of the property and an adjoining alleyway. The plaintiff testified that one of the other children "spied" her and caused her to run and that in running, she stumbled over and fell on a pile of rubbish in the rear yard of the property and that the pile of rubbish was approximately one foot high and about a foot-and-a-half in width.



The attorney for the plaintiff contended that HOLC should have known that children utilized the premises as a playground and that it should, therefore, have guarded against normal hazards that might cause them to be injured. The court, however, took the view that the child was a trespasser, that the doctrine of attractive nuisance had no application and that at most a nonfeasance had been proven. It therefore decided the case in favor of HOLC.

#### SUBROGATION

(HOLC v. Lois Ramsey Henson et al., --- Ind. ---. Decided in November 1940.)

In making loans HOLC was not a volunteer and may be entitled to subrogation even where minor children are involved.

Mr. Eather Ramsey became the owner of the house and lot involved in this suit on November 20, 1930. On November 22, 1930, he borrowed \$500, secured by a mortgage on it, from Fidelity Finance Corporation. His wife, Lois Ramsey, joined in the execution of the mortgage. In the deed by which Eathel Ramsey acquired the property he assumed the payment of street and sewer assessments totalling \$546.05 that were liens on the property. Eathel Ramsey died intestate on August 8, 1933, leaving surviving him his widow, Lois Ramsey, and their five minor children. There was no administration of his estate, but all of his debts were paid except the mortgage indebtedness and the assessment liens on the property.

The widow and children continued to live in the property, and not long after his death, she applied to HOLC for a loan on the property in the amount of \$1110.93. She represented that she was the sole owner of the property and she furnished an affidavit that indicated that she and her husband had held it as tenants by the entirety at the time of his death. HOLC made her a loan of \$1110.93, secured by a first mortgage on the property, the proceeds being used as follows: \$219.10 discharged the balance of the mortgage in favor of Fidelity Finance Corporation, \$536.76 discharged the street and sewer assessment liens, \$56.77 discharged general tax liens, \$267.70 was paid to contractors entitled to mechanics' liens for making necessary repairs on the property which HOLC had required as a condition of its making of the loan, and the remaining \$30 defrayed the expenses of making the loan, including abstract fee, examination of abstract, property inspection fee and recording costs.

Payments were not kept up on the HOLC loan and when it went to foreclose, HOLC discovered for the first time that Lois Ramsey was not the sole owner but only the owner of a one-third interest in the property and that the five minor children had inherited the remaining two-thirds interest. It, therefore, made the five minor children parties defendant, along with their mother, to its foreclosure suit, and prayed for subrogation to the rights of the holders of the mortgage, assessment liens, taxes and mechanics' liens which were paid and discharged with the proceeds of the HOLC loan. The trial court refused to allow the subrogation as to the children's interest in the property and HOLC appealed to the Supreme Court of Indiana.

The Supreme Court of Indiana held that the abstract of title showed that the widow, Lois Ramsey, was not the sole owner of the property and that the attorney who examined it for HOLC was probably negligent in not ascertaining that she was not the sole owner, but that negligence alone does not prevent subrogation. It held that HOLC was not a mere volunteer because the widow and owner of a one-third interest had requested it to make the loan for the purpose of freeing the property from the mortgage, assessment, tax and mechanics' liens. In holding that HOLC was not a volunteer the court cited *Wilson v. Brown*, 13 N. J. Eq. 277; *Gans v. Thieme*, 93 N. Y. 225; *Warford v. Hankins*, 150 Ind. 489; *Johnson v. Barrett*, 117 Ind. 551; *Union Mtg. Tr. Co. v. Peaters*, 72 Miss. 1085.

Having held that HOLC was not a volunteer, the Court stated that it had made the loan in the honest belief that the widow, Lois Ramsey, was the sole owner. It then said that to hold that the interest of the minor children in the property was free of the rights of HOLC and to deny to HOLC the right of subrogation would permit the children to be unjustly enriched at the expense of HOLC which a court of equity and good conscience would not permit to be done where the rights of third parties were not affected. The Court then said:

"Under the authorities above cited, and many others, that might be added, we hold that appellant HOLC is not a stranger or a volunteer, and that it is entitled to subrogation to the extent of the amount of the liens upon the real estate which were paid off with the money advanced by it. But it is not entitled to subrogation as to the cost of the loan in the sum of \$30.00."



TRADE MARKS - TRADE NAMES

(Yonkers Sav. Bank v. Yonkers Savings & Loan Ass'n.,  
Supreme Court, Westchester County, 22 N.Y.S. 2d 368)

The "Yonkers Savings Bank" is not entitled to an injunction restraining the "Yonkers Savings and Loan Association" from doing business under such name, where the use of association's name is not calculated to cause persons of ordinary intelligence and experience to believe that association is a part of or otherwise connected with the bank, and where no unfair competition is shown.

The plaintiff, Yonkers Savings Bank, brought this action to restrain the defendant, the Yonkers Savings and Loan Association, from doing business under that name, on the ground that the defendant's name is so similar to plaintiff's name as to be calculated to cause people of ordinary intelligence and experience to believe that the defendant is a part of or in some way connected with the plaintiff and that, as a result, plaintiff's business will be damaged.

Both of these institutions are under the supervision of the Banking Department of the State of New York and both secure their business from the same types of people and are generally regarded as engaged in the same line of business; that is, receiving savings deposits and making loans upon real estate.

The court dismissed the complaint of plaintiff and in its opinion stated that:

"The rule applicable to cases of this kind has been clearly laid down by the Courts. In *Eastern Construction Co. v. Eastern Engineering Co.*, 246 N.Y. 459, 159 N.E. 397, the Court said: 'Justification, if any, for an injunction restraining defendant from using the word "eastern" as part of its corporate name, must rest upon a finding that the corporate name which the defendant had adopted, with the sanction of the State, is so similar to the name under which the plaintiff conducts its business that the public may be confused and that some persons may do business with the defendant in the belief that they are dealing with the plaintiff.'

"In *Buffalo Typewriter Exchange v. McGarl*, 240 N. Y. 113, 117, 147, N. E. 546, 547, the Court said: 'It must be assumed that the public will use reasonable intelligence and discrimination with reference to the names of corporations with which they are dealing, or intend to deal, the same as with individuals having the same or similar names.'

"In Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173, 90 N. E. 449, 451, it was said that, in actions of this character, 'the law does not justify interference in behalf of ignorant or careless persons.'

"In the case of Bank of Attica, 59 Hun 615, 12 N.Y.S. 648, it was said: 'It is obvious that no general rule can be suggested by which to measure the degree of similarity to be allowed in the names of two corporations of this character. The question simply addresses itself to the good sense and sound judgment of the court, whether, in the particular case, the proposed new name of the petitioner so nearly resembles that of the bank making the objection, as that its assumption and use by the former would be likely to prejudice the rights of the interests or the latter.'

" \*\*\* It seems to me that the question involved here is whether the use of the word 'Yonkers' in connection with the words 'Savings & Loan Association' produces a name so similar in sound and appearance to that of the plaintiff's name as to be calculated to cause persons of ordinary intelligence and experience to believe that the defendant is a branch of or otherwise connected with the plaintiff. In my opinion, this question must be decided in the negative.

" \*\*\* As already stated, I base my decision in this case upon my belief, under all the circumstances shown, that the use of defendant's name is not calculated to cause persons of ordinary intelligence and experience to believe that the defendant is a part of or connected with the plaintiff, and that no unfair competition has been shown."



ADMINISTRATIVE ORDERS, REGULATIONS and OPINIONS

HOUSING

(Comp. Gen. Dec. B-13241, Nov. 4, 1940, U.S.L.W. 2289)

Negotiated fee contracts may be employed for construction of naval housing units for national defense purposes irrespective of source of funds from which construction costs will be defrayed.

Two construction projects are contemplated in the Canal Zone. One is pursuant to Title II of the Act of June 28, 1940 (Public No. 671; LW Stat. Sec., June 25, p. 12), funds to be made available through the floating of a bond issue in conformity with the organic act establishing the United States Housing Authority. For the other projects, funds have been allocated to the Navy Department by the President, which funds were appropriated by Section 201 of the Second Supplemental National Defense Appropriation Act, 1941 (Public No. 781).

Section 201 of the Appropriation Act contains a proviso "that the authority of existing law for the negotiation of cost-plus-a-fixed-fee contracts shall be applicable to housing projects for which funds may be available to the War and Navy Departments or the Maritime Commission."

"The language of the proviso, the reason for its enactment, the legislative policy, and the history of the legislation all point to a conclusion that the Congress intended by the proviso to authorize the use of cost-plus-a-fixed fee contracts for national defense housing projects whether the funds be made available to the War and Navy Departments under the Second Supplemental National Defense Appropriation Act, 1941, or under Title II of the prior Act of June 28, 1940, or other legislation."

THE PRESIDENT: The President, by Order filed November 8, amended certain provisions of the Civil Service Rules with regard to applications, classifications, appointments without competitive examination, probationary appointments, etc. See 5 Fed. Reg. 4445-8.

The President, by Order filed November 8, prescribed regulations governing the payment of expenses of transportation of household goods and personal effects of certain civilian officers and employees of the United States. See 5 Fed. Reg. 4448-4449.

The President, by Executive Order filed November 26, provided that time served in the armed forces shall not be counted in determining the period of eligibility for appointment of persons on Civil Service Registers. See 5 Fed. Reg. 4673.

GOVERNMENT EMPLOYEES: Civil Service Commission: Published a notice of the condition of the apportionment as of the close of business October 31, 1940. See 5 Fed. Reg. 4380-1.

Published a notice of the condition of apportionment at the close of business on November 15, 1940. See 5 Fed. Reg. 4621.

FARM CREDIT ADMINISTRATION: The Federal Land Bank of Columbia amended its fee schedule with respect to prepayment fees. See 5 Fed. Reg. 4479.

FARM SECURITY ADMINISTRATION: The Administrator, by order filed November 5, authorized Regional Directors and their delegated assistants to execute supplemental agreements to Lease and Purchase Contracts. See 5 Fed. Reg. 4413.

The Administrator, by orders filed November 2, designated the localities in Weld County, Colorado, and in Stillwater County, Minnesota, in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 4376.

The Acting Administrator, by regulation filed November 14, delegated certain authority to regional directors, regional personnel, and state RR directors, and provided the terms and conditions of its redelegation. See 5 Fed. Reg. 4519-20.

The Administrator, by order filed November 14, designated the localities in Independence County, Arkansas, in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 4521.



The Administrator, by orders filed November 22, designated the localities in the Parish of Rapides, Louisiana, and in the County of Holmes, Mississippi, in which loans may be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed Reg. 4615-16.

The Administrator, by orders filed November 19, designated the localities in the Parish of Caldwell, Louisiana, and in the County of Allegan, Michigan, in which loans may be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 4576.

FEDERAL HOME LOAN BANK BOARD: Home Owners' Loan Corporation: The General Manager and General Counsel, by order filed November 2, amended the regulation relating to Suspension of Tax and Insurance accruals. See 5 Fed. Reg. 4366-7.

FEDERAL HOUSING ADMINISTRATION: The Administrator, by orders filed November 8, prescribed regulations governing the effect of defaults on certain types of loans by persons in the military service. See 5 Fed. Reg. 4226.

RURAL ELECTRIFICATION ADMINISTRATION: The Administrator, by orders filed November 7, (1) amended previous Administrative Orders, and (2) allocated funds to certain designated projects in Alabama, Arkansas, Colorado, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Missouri, Oklahoma, Pennsylvania, Texas, Vermont, Virginia, Washington, and Wisconsin. See 5 Fed Reg. 4419-20.

The Administrator, by orders filed November 2, (1) allocated funds to designated projects in Illinois, Mississippi, Michigan, Minnesota, Tennessee, Texas, and Wisconsin; and (2) amended previous administrative orders. See 5 Fed. Reg. 4376.

The Administrator, by order filed November 14, allocated funds for designated projects in Alabama, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, and Wisconsin. See 5 Fed. Reg. 4521.

The Administrator, by orders filed November 8, allocated funds for designated projects in Arizona, Colorado, Georgia, Kentucky, Minnesota, Missouri, New Hampshire, Ohio, Virginia, and Washington. See 5 Fed Reg. 4463-4.

The Administrator, by order filed November 18, amended certain designated previous administrative orders. See 5 Fed. Reg. 4548.

The Administrator, by order filed November 27, allocated funds to designated projects in Idaho, Minnesota, Mississippi, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. See 5 Fed. Reg. 4691.



SELECTED REFERENCES

SOLDIERS AND SAILORS CIVIL RELIEF ACT:

[PUBLIC - No. 861 - 76th Congress]  
[Chapter 888 - 3d Session]  
[S. 4270]

AN ACT

To promote and strengthen the national defense by suspending enforcement of certain civil liabilities of certain persons serving in the Military and Naval Establishments, including the Coast Guard.

[PUBLIC RESOLUTION - No. 96 - 76th Congress]  
[Chapter 689 - 3d Session]  
[S. J. Res. 286]

JOINT RESOLUTION

To strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service.

Discussion of Soldiers and Sailors Civil Relief Act of 1918 and 1940:

American Bar Journal.

87 Central Law Journal 1918 p. 368.

Federal Home Loan Bank Review, Vol. 6, No. 12 Sept. 1940 p. 402.

Harvard Law Review, Vol XLVI, No. 7 May 1933.

54 Harvard Law Review p. 278, 286.

16 The Journal of Land and Public Utility Economics Nov. 1940.

Vol. 23 Law Notes 1919.

4 Massachusetts Law Quarterly 1918-19, pp. 35, 218.

5 Massachusetts Law Quarterly 1919-1920, p. 95.

United States Building and Loan League Legal Bulletin, Vol. 6, No. 11.

9 U. S. Law Week 2186.







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# · HOUSING · LEGAL DIGEST

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Number 78

January 1941

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"As in all legislation, we see a conflict of interests and to a certain extent hardship will naturally be incurred by owners of real property and vendors of personal property under conditional sales contracts. However, in the last analysis, legislation of this character does not obliterate obligations but merely for all practical purposes either extends the operations of the statute of limitations or temporarily stays the enforcement of obligations."

New Soldiers' and Sailors' Relief Act  
Suspends State Court Civil Actions --  
(See LEGAL COMMENT, Page 23)

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
CENTRAL HOUSING COMMITTEE WASHINGTON, D. C.

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DECISIONS

COMPETITIVE PRACTICES - FEDERAL TRADE COMMISSION - FEDERAL  
TRADE COMMISSION ACT.

(In re Wauwatosa Fuel & Supply Co., FTC No. 3631, Nov. 29,  
1940, 9 U. S. L. W. 2313)

Price fixing and restriction of competition in sale of  
building supplies is prohibited.

Certain Wisconsin building supply dealers are found to have entered into an agreement under which each dealer filed his prices on various items of building material with a so-called "consultant and advisor," who later mailed prices back to each dealer together with discounts and conditions of sale, each dealer agreeing to adhere to the prices, discounts and terms mailed to him by the consultant. The carrying out of this agreement, it is found, resulted in uniform prices, discounts and conditions of sale and uniform bids to federal procurement officers and purchasing agents for the City of Milwaukee.

The respondent dealers are ordered to cease and desist from concertedly engaging in the following practices:

(1) Establishing and maintaining uniform and minimum prices for the sale of building supplies and uniform terms and conditions attaching to such sales;

(2) Preventing, or interfering with, the purchasing of building supplies by competitors of the respondent dealers; and

(3) Boycotting and threatening to boycott manufacturers and sellers of building supplies who sell or ship supplies to competitors of the respondents.

The respondent dealers are further prohibited from concertedly causing, by promises, threats, coercion or otherwise, manufacturers and sellers of building supplies not to sell or ship supplies to competitors of the respondents or directly to consumers, or to boycott competitors of the respondents and consumers.



HOMESTEAD

(State v. Douglas, --- Wash. ---, 107 Pac. (2d) 593).

The filing of a declaration of homestead creates a vested interest in the property. Homestead and exemption laws are favored in the law and are to be liberally construed.

The question for decision in this case is whether the mortgagors or the mortgagee is entitled to the possession of the property covered by the mortgage, during the redemption period, but after foreclosure and sale.

W. L. and Hazel C. White, husband and wife, were the owners of property covered by a mortgage. They resided thereon with their two minor children. On February 6, 1940, Mr. White filed a declaration of homestead. On March 6, 1940, the Seattle Trust and Savings Bank instituted an action of foreclosure and the property was sold. Thereafter, the plaintiff in the action to foreclose and purchaser at the sale petitioned for a writ of assistance, and the Whites were cited to appear before the court and give their reasons why a writ of assistance should not issue to put the bank in possession of the property. The superior court granted the writ of assistance. The Supreme Court of Washington, in reversing the decision and holding that the mortgagor was entitled to possession of the property during the period of redemption said:

"Section 1 of Article XIX of the constitution of this state makes it the duty of the legislature to protect by law from forced sale a certain portion 'of the homestead and other property of all heads of families.'

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"Section 528 provides that the homestead may be selected at any time before sale, with the provision that, unless it is selected before or within thirty days after a notice in writing of the entry of a judgment, it shall not be exempt from sale.

"In section 602, there is a provision that, when a homestead has been selected in the manner provided by law, '\*\*\* the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation.'

"The filing of the declaration of homestead in this state creates a vested interest in the property. Whitworth v. McKee, 32 Wash. 83, 72 P. 1046; State ex rel. Columbia Valley Lumber Co. v. Superior Court, 147 Wash. 574, 266 P. 731. Homestead and exemption

laws are favored in the law, and are to be liberally construed. North Pacific Loan & Trust Co. v. Bennett, 49 Wash. 34, 34 P. 664; Security National Bank v. Mason, 117 Wash. 95, 200 P. 1097.

"In the case of State ex rel. Federal Land Bank v. Superior Court, 169 Wash. 286, 13 P. 2d 890, it was held that, where the parties obligated to pay the mortgage were not made parties to the action of foreclosure and made no appearance, they would be entitled to possession during the period of redemption. It was pointed out in the opinion in that case that no view was expressed as to what the rule would be where the complaint tendered the issue as to the right of possession during the redemption period or the defendants appeared by answer and did not raise the question. There is no distinction between that case and the one now before us, and, unless it has been modified in some respects, it is controlling.

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"As above pointed out, the statute, Rem. Rev. Stat. sec. 528, gives the right to file a declaration of homestead any time before sale, as therein provided. That right would be denied if the decree of foreclosure should be held to be res judicata, as to the right to possession during the redemption period, in cases where the homestead had been claimed before the foreclosure proceeding was begun and no issue was tendered as to the right of possession."

#### HOMESTEAD - LIENS.

(McMurdie v. Chugg et al., --- Utah ---, 107 Pac. (2d) 163)  
A vendor does not waive his vendor's own personal note for the amount due. Existing liens on property cannot be defeated by subsequently claiming said property as a homestead.

Plaintiff recovered judgment against defendants on certain notes representing the balance due on the purchase price for certain land. The lower court held, however, that plaintiff did not have a vendor's lien on said property and was not entitled to sale on execution because the property constituted the homestead of defendants and was protected from foreclosure by Article XXII, sec. 1 of the Utah Constitution. Plaintiff appealed this decision.

The property had been sold to defendant and a warranty deed was given to them conveying said property. Defendants paid part of the purchase price and gave promissory notes for the balance. Some time later defendants agreed that \$440 was still due on the purchase price



and defendants thereupon executed and delivered two unsecured promissory notes to cover the balance and for attorney's fees in event that collection by an attorney became necessary.

Appellant contended that a vendor's lien never ceased to exist in the seller and that the buyer, therefore, never acquired an unencumbered title to the land and cannot assert a homestead exemption to cut off the vendor's lien. Defendants contended that they had an absolute homestead exemption under the Utah Constitution and furthermore that the seller had accepted promissory notes for the unpaid balance of the purchase price and therefore had waived the vendor's lien, if any had existed.

The court held that a homestead exemption did not exist and that there was a vendor's lien in favor of plaintiff. The court said:

"Article XXII, Sec. 1 of our Utah Constitution provides: 'The Legislature shall provide by law, for the selection by each head of a family, an exemption of a homestead \*\*\* from sale on execution.'

"The language is mandatory and leaves no choice to the legislature.

"Sec. 38-0-1, R. S. U. 1933, provides: 'A homestead \*\*\* shall be exempt from judgment lien and from execution or forced sale, except upon the following obligations: \*\*\* debts created for the purchase price thereof.'

"Respondent insists that the statute quoted is unconstitutional in that it conflicts with Sec. 1 of Article XXII and cites Volker-Scowcroft Lumber Co. v. Vance. 32 Utah 74, 88 P. 896, 125 Am. St. Rep. 828. But that case is readily distinguishable. There plaintiff sought to assert a mechanic's lien for certain work done on the homestead but this Court declared that the statute permitting him to assert his mechanic's lien was unconstitutional because it conflicted with Article XXII, Sec. 1 of the Constitution. Plaintiff there sought to assert a lien against an existing homestead already vested in defendant. That he could not do under the Constitution. But in the instant case appellant points out that respondents never acquired a homestead in the land in that full and clear title to said alleged homestead has never vested in them because they have never fully paid the purchase price and discharged the vendor's lien. There is a great difference in protecting one's homestead to which he has acquired clear title from sale on execution for later incurred obligations and in providing that a buyer is not entitled to a homestead exemption until he has fully paid the purchase price for said homestead. The Volker-Scowcroft case is not in point here.

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"In *Evans v. Jensen*, 51 Utah 1, 168 P. 762, L.R.A. 1918B, 812, we held that a mechanic's lien which attached to certain property when its owner was single and therefore not entitled to a homestead exemption could not be defeated later when the owner married and sought to claim the property as his homestead. Existing liens on property cannot be defeated by subsequently claiming said property as a homestead.

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"But we are confronted with a further question as to the amount of said vendor's lien. At the time when the agreement to sell is entered into, a lien in the amount of the unpaid purchase price attaches to the land. The lien for that amount, or part of that amount if payments are made by the buyer, continues and cannot be defeated by a later existing claim of a homestead exemption. Moreover, interest as agreed between the parties or, in the absence of agreement, legal interest on the unpaid purchase price is included in the amount of the lien which is prior to the claimed homestead exemption right. Interest arises out of and is in effect a very part of the unpaid purchase price, therefore the land is subject to its payment prior to claims arising later. *Green v. Johnson*. Tex. Civ. App. 44 S. W. 6; 66 C. J. 1232, Sec. 1109. \*\*\*

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"We hold, therefore, that Sec. 58-0-1, R.S.U. 1933, does not conflict with Sec. 1 of Article XXII of our Constitution; that a seller has a vendor's lien for the purchase price of land plus legal interest (or lesser interest if so agreed) at the time he sells it, and the buyer cannot escape that lien by claiming the land for a homestead. But said homestead exemption does protect said land against forced sale for attorney's fees provided for in promissory notes issued subsequent to the sale.

"The only question remaining is whether or not in accepting unsecured promissory notes in the amount of the unpaid purchase price appellant waived her right to assert her vendor's lien on the land for the unpaid balance. We hold that she did not. \*\*\*

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"It is a well-established rule of law that a vendor does not waive his vendor's lien for the purchase price simply by taking the vendee's own personal note for the amount due. If the vendor accepts



the obligation of a third party or if he expressly waives his lien it may be extinguished but the taking of the personal unsecured promissory note of the buyer cannot be held to be a waiver of the lien. On this point see notes in 35 L.R.A., N.S., 91; 13 L.R.A. 187; 137 Am. St. Rep. 200; 86 Am. St. Rep. 163; 38 Am. St. Rep. 825; 47 Am. Dec. 111; 39 Am. St. Rep. 825; 47 Am. Dec. 111; 39 Am. Dec. 202."

#### LANDLORD AND TENANT - MORTGAGES

(Skolnick v. East Boston Sav. Bank, Supreme Judicial Court of Massachusetts, 29 N. E. 2d 585)

Where mortgagee of property assumes control of property, collects rent, etc., but fails to foreclose and take title, he is nevertheless liable for injuries resulting to tenant.

Plaintiff brought these two actions for himself and as administrator of the estate of Sarah Skolnick, deceased, against defendant for injuries sustained by intestate in a fall from the rear veranda of an apartment hired from defendant. It appeared that defendant held a mortgage on the property which was defaulted but defendant failed to foreclose and take title because taking title to too many foreclosed properties would impair the public standing of the defendant. Instead, the defendant required mortgagors to bring in the income to the property and this was used to defray the expenses of the property. When foreclosure became a necessity defendant found some irresponsible person to take a deed and to give back a new mortgage for as much as the value of the property, etc. Thus defendant avoided carrying title to the property in its own name for any considerable time. The property in this particular case was handled by one Swartz. However, the court found that Swartz was acting as agent for defendant and found that defendant was the true landlord and liable for the injuries sustained by Sarah Skolnick.

In sustaining the verdict for plaintiff the court said:

"If the defendant through Swartz let the tenement to Sarah Skolnick, it is immaterial that the defendant had no title except by way of mortgage. The act of the defendant in letting the property was an assumption of control, and created the relation of landlord and tenant and the duties attendant upon that relation. Lindsey v. Leighton, 150 Mass. 285, 22 N.E. 901, 15 Am.St.Rep. 199; Curry v. Dorr, 210 Mass. 430, 97 N. E. 87; Connery v. Cass, 277 Mass. 545, 179 N. E. 164; Backoff v. Weiner, Mass. 25 N. E. 2d 718.

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"We find nothing in the statutes governing savings banks that would deprive such a bank of the power, incident to the ordinary Massachusetts mortgage (Hewall v. Wright, 3 Mass, 138, 152, 3 Am.Dec. 98; Mayo v. Fletcher, 14 Pick. 525; Wales v. Mellen, 1 Gray 512; Smith v. Johns, 3 Gray 517, 519; Montuori v. Bailen, 290 Mass. 72, 74, 194 N.E. 714, 97 A.L.R. 789; G.L. (Ter.Ed.) c. 183, §26) to assume possession and control of the mortgaged property through an agent, without making a formal entry to foreclose the mortgage. An entry into possession that is ineffective to foreclose a mortgage may nevertheless give the mortgagee possession of the property and a right to the rents. Lamson & Co., Inc., v. Abrams, Mass., 25 N. E. 2d 374, and cases cited. See, generally, Schleifer v. Worcester North Savings Institution, Mass., 27 N. E. 2d 992."

#### MECHANICS LIENS

(Will B. Miller Co. v. Peerless Lumber Co., Court of Appeals of Kentucky - 143 S. W. 2d 735)

Where materials or labor are furnished under one contract and for one owner in the construction of two or more buildings located on distinct but contiguous lots one lien may be filed and enforced against all the buildings.

The appellant, Will B. Miller Company entered into a written contract with A. F. Stich, by which the latter undertook to build for the former a house. Several weeks later another contract was entered into whereby Stich undertook to build twelve additional houses for appellant on a tract separated from the lot above referred to by 83 feet of land. All of the property was owned by appellant except the 83 feet of land intervening.

Stich, by written contract, purchased from the appellee, Peerless Lumber Company, certain materials to be used by him in the construction of the thirteen houses. This material was supplied as needed in the construction of the houses and Stich made payments from time to time. Stich abandoned the work and left a balance due appellee of over \$7,000. The appellant completed the work and after its completion there was still a balance due to appellee of over \$3,500, which was left unpaid. The appellant sold all of the houses right after they were built and thereafter appellee notified appellant that appellee would claim a lien on both tracts and all the houses thereon in order to secure the payment of the balance due it. The requisite statement was filed by appellee against appellant and Stich alleging that the materials furnished were under a single contract with him and were



used indiscriminately in the construction of the thirteen houses; that appellee had given the statutory notice and done other necessary things to perfect his lien but that nonetheless appellant had sold the property and received consideration therefor without paying appellee the amount due it. Appellee prayed for a personal judgment against appellant and Stich and received a judgment which was affirmed by the Court of Appeals which said:

" \*\*\* It may also be conceded that a materialman cannot assert or enforce a lien on one tract of land or its improvements for material furnished for the erection or repair of improvements on a non-contiguous tract, where the owner of both tracts has made separate contracts for the improvement of each tract. However, by the great weight of authority where materials or labor are furnished under one contract and for one owner in the construction of two or more buildings located on distinct but contiguous lots, one lien may be filed and enforced against all the buildings; and this court so decided in the case of Paterson v. Miller, supra, and in the case of Will B. Miller Lumber Company v. Laval, 283 Ky. 55, 140 S. W. (2d) 376. In fact the two cases referred to arose out of the same building project as that under consideration in this case, and it was expressly decided that the contract of December 3, 1936, between appellant and Stich for the erection of twelve houses on one tract was a non-severable contract. Accordingly, it was held that since notice of the intention to claim a lien had been given the owner within 35 days after the last item of material had been furnished or labor performed on one or more of the houses, the lien was valid and the claimant entitled to a personal judgment against the owner who had sold the property in violation of Section 2467a-1, Kentucky Statutes, notwithstanding the fact that many of the twelve houses had been completed and sold more than thirty-five days before the notice was given."

#### MORTGAGES

(Rives v. Stanford, --- Okla. ---, 106 Pac. (2d) 1101).  
When a mortgagee forecloses and becomes the purchaser at  
the foreclosure sale, but fails to join the holder of an  
interest in the premises as a party defendant, it does  
not foreclose such interest, but equity will keep the  
mortgage alive against the omitted party's interest, and  
the mortgagee will be entitled to an action de novo to  
foreclose as against said interest.

The administrator of a real estate mortgagee's estate foreclosed the mortgage. The foreclosed property was the homestead of the mortgagors, husband and wife. Before the case went to judgment, the husband died. The plaintiff revived the action as against

him in the name of the administrator, and proceeded to judgment. The sale was completed to plaintiff. However, there was an omission in the sale in that the three children of the intestate husband were not made parties to the action. Two of the children were minors and were therefore necessary parties to the effective foreclosure of their interests, and the failure to join them resulted in their interests not being foreclosed. *Bledsoe v. Green*, 133 Okla. 15, 280 P. 301.

The plaintiff then filed the present action against the adult child and the two minor children by their guardian ad litem to "re-foreclose" the mortgage, and obtained judgment. Defendants appealed but judgment was affirmed.

One of the defendant's contentions was that the notes and mortgages sued on and foreclosed in this action had already been merged in the judgment in the former foreclosure, which judgment had been paid and satisfied by the sheriff's sale therein for the full amount of said judgment, and that the judgment is contrary to the evidence and the law. The court in upholding the decision for plaintiff said:

"Under this proposition the defendants start off with the admission of the general rule that equity will afford relief in such situations where necessary parties have been omitted in the first foreclosure action, but they contend for certain exceptions which will be considered later. The gist of this opinion being the general rule, it is better that we first discuss that rule, in order that the exceptions claimed by the defendants may then be more clearly considered.

"The principle involved is the same whether the omitted party be the owner of a fee interest or equitable interest, such as a second mortgage. Our decision in *Darks v. Kansas City Life Insurance Company*, 181 Okl. 165, 72 P. 2d 810, states the general rule: 'When the holder of a first mortgage on real estate forecloses his mortgage and becomes the purchaser at his own foreclosure sale, but inadvertently fails to join the holder of a second mortgage as a party defendant, equity will keep the first mortgage holder's mortgage alive against the holder of the second mortgage, and the senior mortgagee will be entitled to an action de novo to re-foreclose his mortgage as to the omitted parties.'

"See the opinion therein for a full treatment of the question, and also the following: *Jones on Mortgages*, 6th Ed., vol. 1, section 870, p. 912, and vol. 2, paragraph 1679, p. 636; *Bancroft's Code Practice and Remedies*, vol. 6, section 5161, p. 633; *Yoder v. Robinson*, 45 Okl. 165, 145 P. 775.

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"One of the contentions by defendants is that the plaintiff could not maintain this action without first vacating the judgment in the prior action; that the notes were cancelled in the judgment, and that the full amount of the judgment was satisfied by the former sale, and that therefore plaintiff's right to foreclose the interests of defendants now falls for lack of a supporting money judgment. This argument is, however, more of theory and technic than of substance. Neither in the prior action nor in the present action was the plaintiff entitled to any personal money judgment against the defendants, since they did not execute the note or assume any indebtedness. If they had been parties to the prior action, they would have been in no better or worse position than they are in the present action. There is nothing that they could have done in that action, to redeem the property, that they may not still do. They are not faced with two judgments, as they contend. They are not confronted with any valid personal judgment at all; they have the same right of redemption, in a slightly less amount, that they would have had in the former action. Not in any substantial manner have their rights been abrogated or their position worsened."

MORTGAGES - REFINANCING BY HOLC

(U. S. D. C., E. Mich. Schram v. Welton, Nov. 7, 1940.  
9 U. S. L. W. 2319).

Holder of two mortgages on property refinanced by HOLC loan is not entitled to recover unpaid balance on second mortgage note retained pursuant to separate agreement procured from mortgagor at time of settlement in which both mortgages were discharged and HOLC bonds accepted by mortgagee.

The action is brought by the receiver of the mortgage bank against the mortgagors. The bonds did not cover the face amount of the indebtedness. The discharges showed "payment in full," but the HOLC consent form pertaining to the second mortgage had the words "in full settlement of the claim of the undersigned" eliminated by a red-ink line. There was no arrangement for extension of time on the retained mortgage note. The amount thereof plus the HOLC mortgage did not exceed the appraised value of the property. It is not clear from the testimony of the HOLC representative whether or not the settlement arrangement was known and agreed to by him.

Upon the authority of Meek v. Wilson, 283 Mich. 679, a judgment of no cause of action must be entered.

"We can't concur that the HOLC Act anticipates that the debtors be given advantage of a settlement provided by that Act only to be met by added subterranean conditions that destroy for them its full benefits. This court is mindful of the fact that to save their homes under some circumstances a husband and wife will sign almost any paper that at least gives them temporary relief and 'temporary relief' alone was not within the objective of the HOLC. \*\*\*

"It might be that if there had been more definite showing of HOLC knowing the legal effect of the arrangement as it finally culminated and if the testimony of the HOLC official had been more direct, this court would be more embarrassed to arrive at this conclusion, but certainly the burden of proof which after all rests upon plaintiff has not been sustained."

STATE UNEMPLOYMENT COMPENSATION CONTRIBUTIONS

(Conn. Sup. Ct. Err. Waterbury Savings Bank v. Danaher, Nov. 20, 1940, 9 U. S. L. W. 2334).

Federal chartered savings and loan association bank constituted fiscal agent of United States Government and authorized to make direct loans to home owners, in addition to being members of Federal Home Loan Bank is federal instrumentality within meaning of exemption provision of Unemployment Compensation Act.

"The extent to which the [savings and loan] association is identified with and tied into the federal system, independently of the fact of the nature and purpose of its incorporation, is indicated by these facts already referred to, viz; Sole supervision is by the Federal Home Loan Bank of Washington; regular reports must be made to the Federal Home Loan Bank of Boston; \$400,000 of the Home Owners' Loan Corporation is invested in its capital stock; it has been approved by the Federal Housing Administration to act as a mortgagee under the National Housing Act; it has borrowed of the Boston Bank an aggregate total of \$395,500 upon the security of mortgage notes for loans made by it; the accounts of its members are insured by the Federal Loan and Insurance Corporation as required by the National Housing Act; and the mandatory provision of its charter constitutes it a fiscal agency of the United States."



TAXATION - REAL PROPERTY

(Calvin v. Custer County, ---Mont. ---, 107 P. 2d 134).

Where United States was holder of equitable title to property, although legal title was not vested in it until sometime later, land was nevertheless exempt from taxation as of acquiring of equitable title to same.

This action was brought to recover taxes on real property paid under protest. Plaintiff, on April 23, 1938, owned certain land upon which he granted to the United States an option to purchase the land. On June 17, 1938, the United States accepted the option and entered into possession and made extensive improvements, all prior to the first Monday in March, 1939, the day that taxes became due. The formal deed to the property was not delivered until November 15, 1939, as plaintiff had to clear up certain irregularities in the chain of title to certain parcels of the land.

The defendants assessed the land for the year 1939, which was paid before delinquency by a representative of the United States under protest. The United States assigned to plaintiff its claim to recover the tax. The question the court had to determine was whether the land was taxable for the year 1939. In holding that it was not the court said:

"Under section 2, Article XII of our Constitution, 'the property of the United States \*\*\* shall be exempt from taxation.' (Plaintiff contends that the property in question became that of the United States upon the acceptance of the option of June 17, 1938, and hence that it was not taxable for the year 1939. Defendants contend that it did not become property of the United States until the execution and delivery of the deed of conveyance on November 15, 1939, and therefore that it was taxable for the year 1939.

"It should first be noted that while the writing in question here was called an 'exclusive and irrevocable option and right to purchase,' yet it is clear from its terms as a whole that after its acceptance by the United States it became a contract of sale and purchase. In other words, by the word 'accept' as used in the contract, the parties evidently meant the same as 'exercising' the option. There are many provisions of the contract that lead to this result. \*\*\*

"Under our statute taxes become a lien upon property on the first Monday of March in each year (sec. 2154, Rev. Codes 1935), and under section 2002, as amended by Chapter 72, Laws of 1937, property must be assessed to the persons by whom it is owned or claimed, or in

whose possession or control it was at 12 o'clock M. of the first Monday in March. In effect, the law contemplates that the property shall be taxed in the name of its owner. The question then resolves itself into this: Who was the owner of the property on the first Monday in March 1939?

"It is conceded, of course, that the legal title was in plaintiff. The trial court, however, found that the equitable title or estate was in the United States and, that being the case, found that the property was exempt from taxation. The court was correct in its conclusion.

"In the case of *Town of Cascade v. County of Cascade*, 75 Mont. 304, 243 P. 806, 808, it was said: 'The holder of the equitable title or estate, and not that of the holder of the legal title, \*\*\* determines the question of exemption from taxation under our constitutional provisions and those of like import.'

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"The rule is stated in 13 C. J. 855, as follows: 'A contract for the sale of land works a conversion, equity treating the vendor as holding the land in trust for the purchaser, and the purchaser as a trustee of the purchase price for the vendor. The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty, while the purchaser's interest is in the land and is treated as realty.' To the same effect is 18 C. J. S., Conversion, sec. 9, p. 48, and 19 American Jur.--Equitable Conversion--sec. 11. In order for this principle of equitable conversion to apply, however, there must be a binding contract (66 C. J. 703), and such as a court of equity will specifically enforce against an unwilling purchaser. 13 C. J. 855; 3 Pomeroy's Equity Jurisprudence, 4th Ed., sec. 1161.

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"It follows, therefore, that since the United States was the equitable owner of the property on the first Monday of March, 1939, it was not taxable for that year, and the district court properly held that plaintiff was entitled to recover the taxes paid under protest. The judgment is affirmed."



TORTS - LANDLORD LIABILITY TO TENANT

(Grace Richards v. HOLC, City Court, Yonkers, New York.  
Decided in December, 1940.)

In suit by tenant for personal injuries sustained in fall  
down front steps of rented property evidence of repairs  
made on steps by landlord after the accident is inadmis-  
sible to show retention of control of steps by landlord.

Plaintiff, Richards, sued HOLC for damages for personal injuries sustained by her in a fall down the front steps of a property owned by HOLC. The property was a two-story dwelling and contained apartments for two families, one apartment on each floor. Each apartment had its own separate entrance and each entrance was at the front of the building. The entrances were separated by almost the entire width of the building, each being at a front corner of the building. At each entrance door there were a small outside landing and four concrete steps leading down to the sidewalk in front of the property.

Plaintiff was a tenant in the first-floor apartment, having rented the apartment in its "as is" condition. On January 22, 1939, while descending the steps to the sidewalk, plaintiff fell as a result of the chipped and crumpled condition of the second step from the top. At the trial she testified that on several occasions prior to the accident she had reported the defective condition of the step to the contract management broker who had charge of the property for HOLC, and that he had promised to make repairs. She also offered testimony that after the accident HOLC repaired the step. She offered this testimony not for the purpose of showing negligence but for the sole purpose of showing that HOLC had retained control over the steps. The Court, on the authority of *Kisten v. Koplowitch*, 207 App. Div. 642 (N. Y.), excluded the testimony on the ground that evidence of subsequent repairs is inadmissible to show retention of control.

The Court held that HOLC had not retained control of the steps and was under no duty to keep them in repair. It therefore directed a verdict in favor of HOLC and dismissed the suit at the cost of the plaintiff.

TORTS - PROXIMATE CAUSE

(Helen Shamka and John Shamka vs. HOLC, Municipal Court,  
City of New York, Borough of Manhattan, First District.  
Decided in December 1940.)

Slight settling of front stoop and steps of two-family dwelling  
held not proximate cause of fall of person visiting a tenant.

Mrs. Helen Shamka and her husband, John Shamka, sued HOLC for damages for personal injuries sustained by Mrs. Shamka at about

9:30 A. M., January 1, 1940, in a fall on the front steps of a property owned by HOLC in Brooklyn, New York. The property was a two-story, two-family dwelling and contained a single front entrance used by the tenants of both apartments. The front entrance consisted of a small stoop, the floor of which was constructed of wood, and seven wooden steps leading down to the sidewalk in front of the property. There were brick balustrades topped by a stone coping on each side of the stoop and steps. Due to settling, the floor of the stoop and the top step or two sloped slightly downward to the right going down the steps. This settling caused the risers of the top two steps (particularly on the left going down) to be higher than the risers of the remaining steps. Mrs. Shamka had visited a tenant in one of the two apartments in the property, and was injured as she was leaving.

Mrs. Shamka testified that she misjudged the distance as she was going down the steps from the stoop to the sidewalk and was caused to fall; that the stoop had settled in such manner that the landing and the steps sloped downward to one side and that the risers between the treads were thereby caused to vary in height so that some were six inches in height and others were nine inches, and that this variation in the risers caused her to misjudge the distance and to fall. She further testified that at the time of the accident she was wearing house slippers; that in one hand she was carrying an empty milk bottle and in the other hand she was carrying an empty one-gallon glass jug or bottle; that as she descended the steps she did not hold to the brick and stone balustrade on either side of the steps; that the stoop and steps were dry and were not defective other than the sloping and variation in risers; that visibility was good and she could see where she was going, and that she did not know from which particular step she was stepping when she misjudged the distance and fell.

On the testimony just stated, the Court was of the opinion that the proximate cause of the accident was not negligence upon the part of HOLC. Judgment was therefore entered in favor of HOLC and dismissing plaintiffs' case at their cost.

#### TORTS - TRESPASS

(John Gillen v. HOLC, Appellate Division, Second Department, Supreme Court of New York. Decided December 17, 1940.)

An invitee in one portion of a property may be a trespasser in another portion.

In a suit against HOLC in which the plaintiff had recovered a judgment in the Supreme Court of Kings County, New York, for \$750.00 as damages for personal injuries, the opinion of the Appellate Division, Second Department on the appeal was as follows:



"Defendant was the owner of a four-story and basement private dwelling. There was a fence and gate adjacent to the sidewalk and a courtyard between the fence and the building. There were two entrances to the building; one a stoop which led to the upper floor, and another under the stoop. The building was unoccupied. On the front door at the top of the stoop there was a "For Sale" sign, which also contained the name, address and telephone number of the broker. In the center bay window there was another sign reading "No trespassing under Penalty of Law", and further indicating that the property was in the custody of the Home Owners' Loan Corporation.

"Plaintiff, who was in the market to purchase a home, entered the courtyard, walked to the basement door and rang the bell. There was no response and he then walked to the center bay window to look into the basement. In front of this window there was an iron grating. When he stepped on the grating it collapsed and he was precipitated into an opening 12 or 14 feet deep, and was injured. After trial by the court without a jury he was awarded \$750.00, and the defendant appeals.

"Judgment reversed on the law, with costs, and complaint dismissed on the law, with costs. Plaintiff testified he noticed only the "For Sale" sign. The proof discloses that both signs were on the premises at the time of the accident. Even assuming that the "For Sale" sign was an implied invitation to plaintiff to enter the courtyard and go to the basement door, it was no invitation to plaintiff to walk over to the center bay window after he had rung the bell and there was no response to his ringing (Taylor v. Welsh, 185 App. Div., 897). Under all the circumstances, plaintiff failed to establish actionable negligence on the part of the defendant."

#### ZONING

(Howard v. Mahoney, --- Okla. ---, 106 Pac. (2d) 267)

Where a city ordinance prohibits the erection and the use of buildings in violation of the prescribed uses within zones, the use of a building in violation thereof may be enjoined although no effort was made to enjoin the erection of the building.

Plaintiff filed an action to enjoin the use by defendant of adjoining property in a manner violative of certain zoning ordinances of Oklahoma City. A special demurrer to the second amended petition was sustained and plaintiff appealed.

It appeared that defendant had erected in the rear of the premises occupied by her as a home, a large garage and apartment and three separate, distinct and individual apartments to be used by individual families, which were in fact rented out to various tenants. Also defendant erected an annex or addition to the front portion of her home designed and intended to be used by a separate family. All of this construction was in violation of zoning ordinances which plaintiff enumerated and cited, and which same restricted or limited the use of any premises in this district for more than two separate families.

"It may be well to point out that the issue now presented to us does not involve the restraint of construction for that stage is passed. We quote the following statement from Howard's brief: 'We want the court to understand that plaintiff did not ask for an injunction against the erection of those structures but is merely asking that the defendant be restrained from using them for a purpose which she evidently intends, for the reason that such use would be a direct violation of the zoning regulations.'"

Defendants contended that the issues raised were now moot because the construction had been completed and the court should not attempt to now enjoin an accomplished fact. The plaintiff pointed out, however, that the relief sought included an injunction against use after construction, and the court held that "a case will not be dismissed where only one issue may be called moot and there are other issues to be determined. Sec. 28 Oklahoma City Ordinances, supra, forbids the use as well as the erection of buildings in violation of U-1 use. This issue is not moot, for by the demurrer Mahoney admits she is yet using the buildings in violation of U-1 use, if such use constitutes a violation of U-1 use."

Plaintiff contended that the sections of the ordinance plainly applied to the situation here and pointed out that the lot was intended for one building and accessory buildings and not to be used for five families as was to be done in the case here, and that the use of it for such purpose would be in violation of the ordinances under the record. The court found this to be true and in overruling the demurrer said:

"The essential purpose of zoning ordinances is to stabilize property uses. *Strain v. Mims*, 123 Conn. 275, 193 A. 754. In virtually all of the ordinances relating to the use of property, residence use is classed by itself and the encouragement of the segregation of residential districts for the benefit of wholesome family life is paramount in all of the decisions approving such ordinances.

"We think this intention is manifested in the ordinances before us. \*\*\*



" \*\*\* when Mahoney constructed a three-family unit in connection with her garage she clearly violated the language of the ordinance, and when she admits by her demurrer that she is using this building for what amounts to apartment house purposes, in addition to the accessory use permissible, she clearly admits a violation of section 28. As pointed out in Baddour v. City of Long Beach, 279 N. Y, 167, 18 N. E. 2d 18, 21, 124 A. L. R. 1003, Garage use has a definite and well understood meaning as an accessory to a residence.

\*\*\*\*\*

" \*\*\* we do not think it involves an undue or unusual strain upon the language used in the ordinances to say that apartment houses are forbidden within this district, and to say further that the city government intended to forbid overcrowding by limiting the number of dwellings and families to a given lot of city property.

\*\*\*\*\*

"We do not think the argument of laches is sustainable under the record before us. Since the use in violation of the ordinance is as explicitly forbidden as building in violation thereof is, the plea of laches ought not to apply, at least insofar as this record is concerned."

ADMINISTRATIVE ORDERS REGULATIONS AND OPINIONS

PUBLIC LANDS - GENERAL LAND OFFICE - SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 - (G. L. O. Regulations, Dec. 5, 1940, 9 U. S. L. W. 2329).

Regulations are issued relating to rights in homesteading, mining, and other activities on public domain of persons in military service.

The regulations in effect suspend penalties and restrictions which would operate against land or lease holders unable to meet homestead residence or improvement requirements because they are in the military service. Time spent in military service will be credited as constituting residence and cultivation under the homestead laws; and installment payments for land embraced in a homestead or other entry which become due during the period of military service will be suspended.

Benefits under the regulations, which are applicable to persons in military service on Oct. 17, 1940, and to those who enter at a later date, include protection from forfeiture, cancellation or contest proceedings during the period of service, as well as relief from the necessity of performing the \$100 worth of annual assessment work on mining claims.

The regulations provide that persons, excepting mining claimants, seeking to take advantage of the relief provisions of the Act, should file notice of military service with their District Land Office on or before Apr. 17, 1941, or within six months after entrance into military service. In case relief is desired from the necessity of performing annual assessment work under the mining laws, notice of military service must be filed in the county recording office in which the location notice or certificate is recorded. Such notice must be filed before the end of an "assessment year," which terminates at noon on July 1.



THE PRESIDENT: The President, by Executive Orders filed January 13: (1) established, within the Office for Emergency Management of the Executive Office of the President, a Division of Defense Housing Coordination; (2) established the office of Coordinator of Defense Housing; (3) provided for the functions and authority of each; and (4) prescribed regulations governing the relations of such Division and Coordinator with the Federal agencies concerned with housing. See 6 Fed. Reg. 295-6.

FARM CREDIT ADMINISTRATION: The Acting Land Bank Commissioner, by order filed December 10, prescribed regulations for the sale of assets by a joint stock land bank. See 5 Fed. Reg. 4887.

The Governor, by order filed December 30, designated the officers who may approve acts of receivers of joint stock land banks done in pursuance of section 29 of the Federal Farm Loan Act, as amended. See 5 Fed. Reg. 5276.

FARM SECURITY ADMINISTRATION: The Acting Secretary, by memorandum filed November 23, prescribed regulations for making of loans by the FSA in connection with water conservation and utilization projects program and the development of farm units on public lands under Federal reclamation projects. See 5 Fed. Reg. 4764.

The Administrator, by order filed December 7 designated the localities in Routt County, Colorado, in which loans may be made under Title I of the Bankhead-Jones Farm Tenant Act. See 5 Fed. Reg. 4876.

The Administrator, by order filed December 17, canceled the designation of localities in Sussex County, Delaware, for making loans under Title I of the Bankhead-Jones Farm Tenant Act (designation made in 5 F. R. 4306). See 5 Fed. Reg. 5163.

The Administrator, by order filed December 30, completely revised the regulations of the FSA appearing in Title 6, Chapter 3, of the Code of Federal Regulations. See 6 Fed. Reg. 14-32.

The Administrator, by orders filed January 9, designated the localities in Prairie County, Arkansas, and Clay County, Arkansas, in which loans could be made under Title I of the Bankhead-Jones Farm Tenant Act. See 6 Fed. Reg. 224-5.

The Administrator, by order filed January 9, delegated authority to regional directors to transfer borrowers from the fixed basis payment plan to the variable payment plan and vice versa. See 6 Fed. Reg. 225.

The Administrator, by order filed January 13, designated the localities in Stevens County, Washington, in which loans could be made pursuant to Title I of the Bankhead-Jones Farm Tenant Act. See 6 Fed. Reg. 410.

The Administrator, by order filed January 15, designated the localities in Dale County, Alabama, in which loans could be made pursuant to Title I of the Bankhead-Jones Farm Tenant Act. See 6 Fed. Reg. 449-50.

FEDERAL HOME LOAN BANK BOARD: The FHLBB, by resolution filed November 29, prescribed the terms of purchase of properties by former borrowers. See 5 Fed. Reg. 4736.

The FHLBB, by resolution filed January 14, amended the accounting procedure of the HOLC with regard to loans for reconditioning and other loans made under subsections 4(m) or 4(f) of the HOLC Act of 1933. See 6 Fed. Reg. 418.

FEDERAL WORKS ADMINISTRATION: The Administrator, by regulation filed January 8, prohibited discrimination, on the basis of race, creed, color, or political affiliations, in the employment of persons in the development of defense housing. See 6 Fed. Reg. 196.

RURAL ELECTRIFICATION ADMINISTRATION: The Administrator, by order filed December 3, allocated funds for designated projects in Louisiana, South Carolina, and Tennessee. See 5 Fed. Reg. 4792.

The Administrator, by order filed December 7, allocated funds to designated projects in Michigan, Minnesota, and Pennsylvania. See 5 Fed. Reg. 4877.



The Administrator, by notices filed December 14, allocated funds to designated projects in Alabama, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Minnesota, Missouri, Oregon, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. See 5 Fed. Reg. 5137.

The Administrator, by order filed December 16, amended previous administrative orders by which funds were allocated. See 5 Fed. Reg. 5163.

The Administrator, by order filed December 28, allocated funds for a designated project in Alabama. See 5 Fed. Reg. 5303.

The Administrator, by order filed January 15, allocated funds to designated projects in Iowa, Kansas, Missouri, New Mexico, and Texas. See 6 Fed. Reg. 450.

LEGAL COMMENT

NEW SOLDIERS' AND SAILORS' RELIEF ACT SUSPENDS STATE COURT CIVIL ACTIONS. By George H. Cabaniss, Jr., Congressional Record, Vol. 87, No. 5 (January 10, 1941) - From December issue of the State Bar Journal of the State Bar of California.

With hundreds of Californians being inducted into military service, lawyers will be called upon to advise trainees of their rights under the Soldiers' and Sailors' Civil Relief Act and to aid them in obtaining the moratorium benefits of this new Federal legislation.

Many of the men called into service are under contractual obligations to pay for automobiles, homes, furniture, and other articles by monthly payment agreements. The Soldiers' and Sailors' Civil Relief Act is intended to empower the State courts to protect the rights of these men by appropriate moratorium procedure. An understanding of the essential provisions of this act will undoubtedly prove helpful to all members of the bar.

The Soldiers' and Sailors' Civil Relief Act of 1940, with few variations, is a continuation of the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918 (40 Stat. 440, U. S. Code Annotated, title 50 War, p. 178).

Acts of this character are by no means foreign to American tradition. Congress, by the act of March 16, 1802 (2 Stat. 136), forbade the arrest for debt of any soldier where an obligation of less than \$20 was incurred previous to the enlistment. Similar legislation was adopted during the Mexican War in 1846.

Congress, by acts of March 3, 1863 (12 Stat. 755), and May 11, 1866 (14 Stat. 46), passed legislation protecting persons from liability for acts committed under color of military authority during the war.

The constitutionality of the previous acts was unchallenged, and they were considered covered by the necessary and proper clause, article I, section 9, clause 18, Constitution of the United States.



A precedent for interference with State legislation of this character by the Federal Government was the opinion of Mr. Justice Field in Tarbell's Case (1871) 13 Wall. 397), where the Justice said:

"Whenever, therefore, any conflict arises between the enactments of the two sovereignties or in the enforcement of their asserted authorities, those of the National Government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States."

Judge Munger (Clark v. Mechanics American National Bank, et al., 282 Fed. 589), allowing recovery to a plaintiff in an action to enforce a mechanic's lien where the Arkansas statute prescribed such an action to be instituted within a year, excluded the period when the plaintiff was in the service of the United States military forces from the running of the statute, and said:

"Congress possesses power to regulate proceedings in the state courts by virtue of its power to wage war."

and cited Stewart v. Kahn, ((1870) 11 Wall. 493, 20 L. Ed. 176).

The 1918 act, passed during the war, was in effect a moratorium for extending the statute of limitations as affecting certain obligations of individuals or dependents of such individuals who were members of the armed forces of the United States. The act was based upon the war powers under article I, section 8, of the Constitution of the United States.

The 1918 act remained in force until the termination of the war and for 6 months thereafter (sec. 603).

The 1940 act is based upon the same principles and is applicable to persons who are now members of the armed forces of the United States, or their dependents, under the present emergency.

The act will remain in force until May 15, 1945, except that, if the United States becomes engaged in war, the act will remain in force until the war is terminated by treaty of peace proclaimed by the President and for 6 months thereafter.

Article I, general provisions, section 100, in effect a preamble, states as follows:

"That in order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the

national defense, provision is hereby made to suspend enforcement of civil liabilities in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this act remains in force."

Article II, general relief, section 200, provides for the appointment of counsel to protect a defendant absent in the military service. Before a default may be entered the plaintiff must file an affidavit that the defendant is not in the military service. In the event a person is in the military service, the court may require a bond as a prerequisite before the entry of a default judgment. Such a bond would indemnify the defendant against loss if the judgment is subsequently set aside.

If a judgment is obtained against a person while in the military service, or 30 days thereafter, he may, within 90 days of the termination of his military service, if he has a meritorious legal defense, have the action reopened. However, a vacation setting aside or a reversal of a judgment will have no bearing upon the rights of a bona fide purchaser for value at a sale under such judgment.

Section 201 grants a stay to proceedings involving a person in the military service, either plaintiff or defendant, during the period of such service and for 60 days thereafter, unless the court may find that the ability of the party, as plaintiff or defendant, to prosecute or defend "is not materially affected by reason of his military service."

Section 203 grants a stay of execution, attachment, or garnishment while a person is in the military service of the United States, and for 60 days thereafter.

Section 204 permits the court to extend proceedings 3 months after military service. In case a person in military service is a co-defendant with others, the court may allow the action to proceed against the parties who are not in the military service.

Section 205 excludes time of military service from computation of time under existing or future statutes of limitation.

Article III deals with rent, installment contracts, and mortgages.



Under section 300 of the 1918 act, no eviction could be made where the rental of the premises did not exceed \$50 per month. Under the 1940 act the rental must not exceed \$80 per month on dwellings occupied by wives, children, or dependents of persons in the military service.

In such proceedings, by request of the defendants of the person in military service, or on its own initiative, the court may, and on application of the party claiming the exemption, unless evidence is adduced before the court that the financial ability of the tenants to pay the rent has not been materially changed on account of military service, grant a stay which could not exceed 3 months, or make such other order as, under the circumstances, would seem just.

Any person who summarily evicts a tenant, except as provided by law, is guilty of a misdemeanor, punishable by 1 year's imprisonment or a \$1,000 fine, or both.

The Secretaries of War, Navy, and the Treasury are allowed power to prescribe allotment of the pay of persons in the military service in reasonable proportion to pay the rental of premises occupied by wives, children, or other dependents of such persons.

Sections 301 to 303 are applicable to installment contracts of real and personal property and are probably more far-reaching in their effect than any other of the provisions of the act.

Section 303 is new and reads as follows:

"(Repossession proceedings.) No court shall stay a proceeding to resume possession of a motor vehicle, tractor, or the accessories of either, or for an order of sale thereof, where said motor vehicle, tractor, or accessories are encumbered by a purchase-money mortgage, conditional sales contract, or a lease or bailment with a view to purchase, unless the court find that 50 percent or more of the purchase price of said property has been paid, but in any such proceeding the court may, before entering an order or judgment, require the plaintiff to file a bond approved by the court, conditioned to indemnify the defendant, if in military service, against any loss or damage he may suffer by reason of any such judgment or order should the order or judgment be set aside in whole or part."

Sections 301 and 302 are similar to the 1918 act. The former section provided in cases of contracts of purchase of real or personal property that the vendor, when paid any deposit or installment, could not rescind the contract or obtain possession of the property for non-payment, except by action of court of competent jurisdiction. The

court could, as a prerequisite to the termination of the contract, order the repayment of the previous installments, unless the court would have proof that the financial ability of a person in the military service was not adversely affected because of such service.

Under section 302 the provisions are applicable only to contracts entered into prior to entrance into military service.

Article IV deals with insurance. The only difference to the 1918 act is that under the former the benefits of the act were under regulations enacted by the Secretary of the Treasury, while under the 1940 act the regulations are prepared under the direction of the Administrator of Veterans' Affairs. The objects of the insurance provisions are twofold: to safeguard the interests of persons in the military service and their insurance policies, and to protect the commercial- and life-insurance companies.

Benefits of the act extend to any person in the military service whose insurance policies do not exceed a face value of \$5,000, premiums on which have not been delinquent for more than 1 year previous to the date of application for relief, and where the loans do not exceed 50 percent of the cash-surrender value.

Insurance companies receive certificates from the Administrator of Veterans' Affairs in the name of the United States Government as a guaranty for the payment of the premiums, with interest, the United States obtaining a first lien on any policies so safeguarded.

Section 414 limits the coverage of insurance companies allocated by law to maintain a reserve, or which shall make provision for the collection from those insured of premiums which will protect the coverage of the risk of insured persons who are in the military service.

Article V is entitled "Taxes and Public Lands."

Section 500 grants a moratorium staying the sale for tax delinquencies for such lands for a period of 6 months after the date this act ceases to be in force. A person whose lands have been sold or forfeited for taxes may commence an action for redemption either at a period not later than 6 months after cessation of service or for 6 months beyond the life of this act. This provision, however, is not to be deemed to decrease the length of any period at present provided by the law of any State or Territory for the redemption of such taxed lands.



Secretaries of War, Navy, and the Treasury are to prescribe regulations to give notice to persons in the military service under their jurisdiction, their privileges granted by this section, and steps necessary for them to claim their benefits.

Sections 501 to 512 apply to requirements of public lands, homestead, and mineral entry.

Article VI provides administrative remedies. In actions under this act a certificate of The Adjutant General of the Army, the Chief of the Bureau of Navigation of the Navy, or the major general Commandant of the United States Marine Corps shall constitute prima facie evidence as to the facts of military service of any persons who come within the purview of the protection of the act.

Section 604 designates the act shall be cited as the Soldiers' and Sailors' Civil Relief Act of 1940.

An analogy to the provisions for the suspension of the running of the statute of limitations was the act of Congress, June 11, 1864 (13 Stat. 123), entitled "An act in relation to the limitation of actions in certain cases," which provided for suspension of the running of the statute of limitations as to rights of persons in the North, which could not be enforced in the Confederate States by reason of the war.

Mr. Justice Swayne, in Stewart v. Kahn, supra, held such legislation valid as within the war power, and said:

"In the latter case the power (war power) is not limited to victories in the field and the dispersement of insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category."

The United States Supreme Court, in Hanger v. Abbott ((1867) 6 Wall. 532, 18 L. ed. 939), decided that, independent of the act of 1864, the time in which the courts in States which had seceded were closed to citizens of loyal States, should be deducted from the time prescribed by the statute of limitations of such States, in spite of the fact that such statutes were silent as to such exceptions and the congressional act of 1864 was not taken into consideration.

In the 1918 act Mr. Justice Brandeis (Ebert v. Poston (1924) 266 U. S. 548; 45 S. Ct. 188)) held that the suspension of the running of the statute of limitations was prospective, not retroactive, and was inapplicable to proceedings instituted previous to military service.

The California District Court of Appeal construed the 1918 act in two decisions--Riordan v. Zube ((1920), 50 Cal. App. 22; 195 Pac. 65), where Justice Nourse decided that a justice court, by reason of the provisions for stay of judgment, was not deprived of its jurisdiction. In that case the dependents of persons in the military service endeavored, by an equitable action, to set aside a judgment of eviction which was valid on its face, no appeal having been taken.

Judge Kerrigan held in Mader v. Christie ((1921) 52 Cal. App. 138) that the filing of the affidavit was valid, even though filed after entry of default, if it were filed prior to the entry of judgment.

It is singular that few cases involving construction of the 1918 act reached the Federal courts, and despite the novel problems, but few cases were adjudicated in the State courts.

In all probability, 22 years ago installment contracts were not so widespread as at the present time.

As in all legislation, we see a conflict of interests and to a certain extent hardship will naturally be incurred by owners of real property and vendors of personal property under conditional sales contracts. However, in the last analysis, legislation of this character does not obliterate obligations but merely for all practical purposes either extends the operations of the statute of limitations or temporarily stays the enforcement of obligations.



LEGISLATION

NEBRASKA - Bill 31.

To amend the Housing Authority Law (Sec. 14-1403, C. S. Supp. 1939) to extend the term of office of the members of the Authority from one year to five years, the respective terms to be staggered.

NEW YORK - AB 346

To amend the public housing law to authorize the State Superintendent of housing to prepare and execute plans for slum clearance and the construction of low-cost housing facilities in the 17 districts in New York.

UTAH - HB 20

To establish Redevelopment Corporations for the purpose of slum clearance and low-cost housing construction in cities.

## SELECTED REFERENCES

## CODES

Brick cavity walls: New York City building code requirements. Brick manufacturers Association of New York, Inc. 12pp. (The Association, 2721 Grand Central Terminal, New York, N.Y. Tech. Bulletin No. 14, Oct. 1940) . . .

Minimum fire district requirements. (The Municipality--Wis.,--Nov. 1940; Vol. 35, No. 11, pp. 243-244.)

New York Code Requires Standard Soil Pipe. (Industrial Standardization and Commercial Standards Monthly Oct. 1940; vol. 11, No. 10. p. 256.)

## HOUSING

-Construction.

Building permit survey, 1936-38: BPS2-73 to BPS2-126 (with omissions). [1940.] large 8° [Construction and Public Employment Division in cooperation with Work Projects Administration.] Labor Department - Labor Statistics Bureau.  
L.C. card L37-166 L2.12:

-Dwellings.

Minimum construction requirements for new dwellings located in Tennessee, Federal Housing Administration, Memphis, Tenn. Revised Oct. 15, 1940. [1940.] [27/24/17] p. 11. (FHA form 2316.) Federal Loan Agency - Federal Housing Administration. FL2.11:T25/940

-General.

Clip sheet. Federal Housing Administration clip sheet, v. 24. no. 12; Nov. 1, 1940 [1940.] 1 p. 11. large 4° [Weekly.] Federal Loan Agency - Federal Housing Administration. FL2.7:24/12

Housing. Investigation of concentration of economic power, study made [by Peter A. Stone and R. Harold Denton] for Temporary National Economic Committee, 76th Congress, 3d session, pursuant to Public resolution 113 (75th Congress), authorizing and directing select committee to make full and complete study and investigation with respect to concentration of economic power in, and financial control over, production and distribution of goods and services; Monograph no. 8, Toward more housing. 1940. xxi + 223 p. 11. 3 pl. (Senate committee print, 76th Congress, 3d session.) [Bibliographies interspersed.] Superintendent of Documents, Government Printing Office. Paper, 30¢. L.C. card 40-29291 Y 4.T 24 : M 75, no. 8



-Private

Low-rental housing for private investment. /1940.7/17 / 31/27 p. il. 4° (/FHA form no. 24187) Federal Loan Agency - Federal Housing Administration. FL2.2: L 95

Housing. Private housing in greenbelt towns. 1940. 1 p. (Serial no. R. 1181.) /From Monthly labor review, Sept. 1940.7 Labor Department - Labor Statistics Bureau. L 2.6/a: H 817/20

-Public

Waverly. a study in neighborhood conservation /prepared by Arthur Goodwillie/, n. o. 1940. x / 97 p. il. 4° /Incorporates data and conclusions developed in the Waverly Community conservation test in Baltimore, Md. 7 Federal Loan Agency - Federal Home Loan Bank Board. L. C. card 40-29292 FL3.2:W 36

Report of the Alley Dwelling Authority for the District of Columbia. For Fiscal Year Ended June 30, 1940. /1940/ 32 p. 3 charts. District of Columbia.

Low-rent housing. Steps in development of low-rent housing project, subsequent to execution of contracts for loan and annual contributions, Addendum 1. Oct. 1, 1940. /3/ p. 4° (Bulletin 15 /on policy and procedure, addendum 17: ) /Title of Addendum 1 is: Tie low bids on construction, equipment, and material contracts.7 Federal Works Agency - Housing Authority. FW 3.9:15/add.1

Public Housing for planners and builders of American communities, Oct. 29-Nov. 23, 1940; /v. 2, no. 18-217. /1940.7 Each /11/ p. il. f° /Weekly.7 Superintendent of Documents, Government Printing Office. Paper, 5¢. single copy, \$1.00 a yr.; foreign subscription \$1.80. FW 3.7:2/13-21

Public housing projects, as of Sept. 20, 1940; /map 7. /1940.7 21 x 15 in. /Supplement to Public housing projects, Oct. 22, 1940 / Federal Works Agency - Housing Authority. FW3.7:2/17/supp.

LAWLabor laws and legislation.

Handbook of Federal labor legislation, labor standards on Government contract work and work financed by United States; /compiled by Elsie Gluck7. 1940. viii / 86 p. (Bulletin 39, pt. 1.) /issued in loose-leaf form.7 Superintendent of Documents, Government Printing Office. Paper, 35¢. L. C. card 140-162 LL6.3:39/pt.1

MISCELLANEOUS

Federal home loan bank review, v. 7, no. 2; Nov. 1940. [1940.] cover title, p. 53-64, il. 4<sup>o</sup> [Monthly.] Superintendent of Documents, Government Printing Office. Paper, 10¢. single copy, \$1.00 a yr.; foreign subscription, \$1.60. L.C. card 34-28163 FL3.7:7/2

Decisions and orders of National Labor Relations Board, v. 17, Nov. 1-30, 1939, 1940. x + 1160 p. Superintendent of Documents, Government Printing Office. Cloth \$1.75  
L.C. card 37-26136 LR1.8:17

MORTGAGES-Farm

Farm Mortgages. Lender distribution of farm-mortgage recordings, data for United States and geographic divisions, 1910-35, and by States, 1917-35. Washington, D. C., Nov. 1940. [2] + 60 p. 4<sup>o</sup>  
[Processed.] Agriculture Department - Agricultural Economics Bureau. A36.2:M84/7

Moratorium on Farm Mortgages. Opinions of the Supreme Court of the United States in certain cases involving the constitutionality of and proceedings under section 75, sub-section (s) of the bankruptcy Act, as amended. 76th Congress, 3d Session, Senate Document No. 315

-Foreclosures

Foreclosures. Non-farm real estate foreclosures, Sept. 1940. [Oct. 29, 1940.] 2 + [8] leaves, il. 4<sup>o</sup> [Monthly. Processed.] Federal Loan Agency - Federal Home Loan Bank Board. FL 3.8:940/9

-General

Applying a mortgage portfolio analysis. Fred H. Allen. p. 4-8 in Real Estate Record, Vol. 146, No. 15 (3787) Oct. 12, 1940.

Basic concepts in mortgage lending. Ernest M. Fisher. pp. 4-5, 8 in The Mortgage Banker, Vol. 2, No. 19, Oct. 1, 1940.

-Insurance

Mortgage insurance. Property standards [requirements for mortgage insurance under title 2 of national housing act] : pt. 6, Minimum requirements for District of Columbia, Washington, D. C. Revised Nov. 1, 1940. 1940. ii + 8 p.  
(Circular 2; FHA form 2274.) Federal Loan Agency - Federal Housing Administration. FL2.4:2/pt. 6, D.C./940

---Same: pt. 6, Minimum requirements for Hawaii, Honolulu, T. H. Revised Nov. 1, 1940. 1940. ii + 7 p. (Circular 2; FHA form 2279.) FL2.4:2/pt. 6, Hawaii/940



PROPERTY

The evolution of real estate titles. William M. West. (Real Estate Magazine. Nov. 1940, pp. 23, 81.)

Homesteads. [Edition of 1940.] [May 23, 1940.] 7 leaves, 4°  
[Processed.] Agriculture Department - Farm Security Administration.  
A61.2:H75/940

Land Use. 1940 summary of outstanding Federal and State legislation affecting rural land use. Washington, D. C., Sept. 15, 1940.  
[4] + 42 p. il. 4° (L. E. Bulletin 57.) [Processed.] Agriculture  
Department - Agricultural Economics Bureau A36.121:57

TAXATION

Taxation of governmental securities and salaries, report [and views of minority] pursuant to S. Res. 303 (75th Congress). 1940.  
[2 pts.] S. rp. 2140, 2 pts., 76th Cong. 3d sess.)  
L.C. card 40-29317

Taxation. Investigation of concentration of economic power, study made [by H. Dewey Anderson] for Temporary National Economic Committee, 76th Congress, 3d session, pursuant to Public resolution 113 (75th Congress), authorizing and directing select committee to make full and complete study and investigation with respect to concentration of economic power in, and financial control over, production and distribution of goods and services: Monograph no. 20, Taxation, recovery, and defense. 1940. xviii + 374 p. il. 1 pl. (Senate committee print, 76th Congress, 3d session.) Superintendent of Documents, Government Printing Office. Paper, 35¢  
L.C. card 40-29345 Y4.T24:M75, No. 20

HOUSING

-Construction, housing and real property. 1940. 169 p. (Budget Bureau, Executive Office of the President, Central Statistical Board.) 35¢ Pr.32.102: C 76







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# · HOUSING · LEGAL DIGEST

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Housing is a problem of coordinated planning embracing the elements of education, recreation, health, traffic, services, and business--as well as shelter. The mere assemblage of dwelling units does not solve the problem. New environments should be so planned that they do not impose burdens on the services of the communities in which they are built. Defense housing presents a challenge to local interests to shape community futures while meeting emergency needs.

From "Defense Housing : 1940"

--February 1941 PENCIL POINTS

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DECISIONS : OPINIONS : LEGISLATION  
RELATING TO HOUSING CONSTRUCTION AND FINANCE  
ISSUED MONTHLY BY THE  
CENTRAL HOUSING COMMITTEE WASHINGTON, D. C.

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## HOUSING LEGAL DIGEST

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## DECISIONS

UNITED STATES - RFC - COSTS

(Reconstruction Finance Corporation v. Menihan, ---U. S.---, Decided February 3, 1941).

The Reconstruction Finance Corporation is subject to the payment of court costs.

The question involved in this case is whether or not the Reconstruction Finance Corporation is subject to the expenses of court costs in litigation where it has been the unsuccessful party. In holding that it is subject to such costs the United States Supreme Court, through Chief Justice Hughes, said:

"The Reconstruction Finance Corporation is a corporate agency of the government, which is its sole stockholder. 47 Stat. 5; 15 U. S. C. 601. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The Corporation has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions (see Pittman v. Home Owners' Loan Corporation 308 U. S. 21, 32-33), still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. Sloan Shipyards v. United States Fleet Corporation. 258 U. S. 549, 566-567. Congress has expressly provided that the Reconstruction Finance Corporation shall have power 'to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal'. There is nothing in the statutes governing its transactions which suggests any intention of Congress that in suing and being sued the Corporation should not be subject to the ordinary incident of unsuccessful litigation in being liable for the costs which might properly be awarded against a private party in a similar case.

\* \* \* \*

"\* \* \* we decided in Federal Housing Administration v. Burr, 309 U. S. 242, that the Federal Housing Administration was subject to be garnished under state law for moneys due to an employee. There, the Administrator under National Housing Act was authorized 'to sue and be sued in any court of competent jurisdiction, State or Federal'. 49 Stat. 722. Starting from the premise indicated in the Keifer [Keifer v. Reconstruction Finance Corporation 306 U. S. 381] case that waivers by Congress of governmental immunity from



suit should be liberally construed in the case of federal instrumentalities--that being in line with the current disfavor of the doctrine of governmental immunity--we concluded that in the absence of a contrary showing 'it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued' that agency is 'not less amenable to judicial process than a private enterprise under like circumstances would be'. Following that reasoning, the precise point of the decision was that the words 'sue and be sued' normally embrace all civil process incident to the commencement or continuance of legal proceedings and hence embraced garnishment as part of that process.

"These decisions chart our course. The Reconstruction Finance Corporation is expressly authorized to sue and be sued. It has availed itself of that authority to bring the defendants into court to answer the charge of trade-mark infringement. The defendants have successfully resisted the charge and the question is whether they should be denied the usual incidents of their success. We apply the principle that there is no presumption that the agent is clothed with sovereign immunity. We look as in the Keifer and Burr cases to see whether Congress has endowed petitioner with that immunity and we find no indications whatever of such an intent. We apply the further principle that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings. The payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident. The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. *Sprague v. Ticonic Bank*, 307 U. S. 161. We perceive no reason for holding that petitioner may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process in case its assertions of right prove to be unfounded. On the contrary, we think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances."

CONVERSION - TRESPASS - LANDLORD AND TENANT

(John Zadina vs. HOLC et al, District Court of the United States for the District of Nebraska, Omaha Division. Decided January 13 1941.)  
Conversion - Landlord who legally takes possession of realty is not guilty of conversion of personalty left in the property by tenant where he affords tenants ample opportunity to remove the personalty.

HOLC foreclosed a mortgage loan it had made to Zadina and acquired title to the property on February 7, 1938. The property contained a greenhouse and living quarters. After the foreclosure, Zadina remained in the

property as a tenant of HOLC, the last lease having been executed on December 12, 1939 and being on a month-to-month basis with the right of termination on written notice. HOLC, having a prospective purchaser or better tenant of the property, Wojtkiewicz, on April 12, 1940, through its contract management broker, Merker Realty Company, gave written notice to Zadina to vacate and surrender the property by May 12, 1940. Zadina, as hereinafter shown, removed himself and his family from the property. He also removed some of his personal property, but he did not remove his plants, flowers, bulbs, etc. from the greenhouse.

HOLC, through its contract management broker, Merker Realty Company, took possession on May 13, 1940, and later installed the new tenant, Wojtkiewicz. New locks were put on the doors at that time. Shortly thereafter, Zadina instituted suit for \$10,000.00 damages against HOLC and its contract management broker. This suit was instituted in a State court, but was removed by HOLC to the United States District Court where it was tried on its merits, the principal contention of Zadina being that his personal property, plants, flowers, bulbs, etc., to the value of \$4500.00, had been wrongfully converted. In directing a verdict in favor of HOLC and its contract management broker, the United States District Court, among other things, said:

"What is the evidence in this matter? The evidence dealing with the claim starts with the loss of the plants. The agent of the landlord and his mechanic come to the premises when they are expecting it to be vacated and under the terms of the lease they have a right to enter it and make repairs or put on these locks. Nothing unlawful about that, whatever. No denial of that right. Nobody denied the right to put on the locks. The plaintiff and his family are occupying the premises. The agent and the mechanic leave the premises. They are in possession of it. Until they locked the doors when they vacated. Now according to the testimony plaintiff then sought advice of his counsel, Mr. Krajicek, what to do. He was advised to vacate; to do as they demanded. According to his testimony he said he stored some of his household goods out in the garage. I don't know that anybody told him to do that but he did it in order to make way for papering or painting in some rooms where the household goods had been. To leave them out there. He vacates the premises. Now he leaves all these chattels there in part of the premises. Demand is made that he remove the property, that he take his goods with him. He said he couldn't take them with him because he had no place to put them; couldn't dispose of his merchandise or his plants because there was no market for them at that particular time.

"Now before there could be any trespass he would have to be denied the right to the possession of his property; had to be excluded from taking it. Instead of that the landlord here was demanding and exacting that he take his property away so that they might get possession of the premises for this new tenant. The new tenant was put in possession. Nothing here to show by



his testimony as to who told him that he should not surrender any of these plants. Nothing to show it was anybody connected with the HOLC. Even if they did they were assuming to protect the property while it was in the building there so that it might not be carried away and according to all the admitted evidence here they were anxious that he should remove the property and get it away.

"Now the property deteriorated, that is true. It wasn't due to any act on the part of the HOLC. According to the testimony introduced by the plaintiff himself they had watered and taken care of the plants even long after this suit was started. He started this action five days after he abandoned possession of the place. No evidence to show that he was denied any right to the property up to that time.

"Now then the charge in the petition is that they took this property and converted it to Mr. Wojtkiewicz, the succeeding tenant. That is the claim. What is the fact? That man came upon the witness stand and said it was not. That all he did was try to preserve the property and water it. That he wanted it out of there and he never took any possession of it; never had anything to do with it. In fact I inferred from his testimony that he objected to and did not take occupancy of the premises because of the presence of this property that was in there.

"So gentlemen, as a matter of law there is no trespass shown by this evidence. No unlawful trespass. First the contract between the parties themselves gave the Home Owners' Loan Corporation the right to enter the premises upon the termination of the lease. That right was not denied. If the plaintiff had denied them the right and said 'No, you can't have possession notwithstanding the fact I have signed this lease', then their remedy was an action for forcible detainer of the property. But he didn't do that. When they went he went out. Later after the case was started he tried to get this property out of there. Although that isn't shown in the evidence here there was some reference made to it in the pre-trial investigation.

"Now there is no unlawful trespass in the first place and there is no conversion of the property. His property is just simply depreciated. It is an unfortunate situation but it is damage that the defendant in this case is not responsible for. They were under no obligation to take care of this property when they were asking him to come and take care of his own property but they did so. He couldn't walk out, turn the key in the door and say 'now it is yours, you take it and convert it and I will recover damages from you'. That is in effect what is being done here.

"So, there is no conversion of this property at all. This tenant did not take the property; did not use it, and didn't deny them the property. Neither did the defendant; or the other defendant. They left it there until it

depreciated. It is unfortunate that he didn't have a place in reserve to take care of the property but those things happen every once in a while and there is no redress for that sort of thing in this kind of an action.

"So, that being the situation, gentlemen, it is the duty of the court to direct a verdict in this case for the defendant."

#### MUNICIPAL CORPORATIONS - TAXATION

(State of Florida ex rel. Harper v. McDavid, Assessor, and the Housing Authority of the City of Pensacola Florida, \_\_\_ Fla. \_\_\_ decided January 7, 1941.)

Property owned by a Housing Authority and used for a low-rent housing and slum clearance project is held exclusively for municipal or charitable purposes and is exempt from taxation.

On petition of a citizen and taxpayer alternative writ of mandamus was directed to the Tax Assessor and to the Housing Authority of the City of Pensacola commanding them to place on the tax rolls of Escambia County for the year 1940 and subsequent years certain lands owned by the Housing Authority or to show cause why they refuse to do so.

The Supreme Court of Florida in affirming the judgment of the Circuit Court for Escambia County dismissing the writ held that the property owned by the Housing Authority of the City of Pensacola organized in Chapter 17981, Acts of 1937, and used for the conduct of a low-rent housing and slum clearance project is held exclusively for municipal or charitable purposes and is thereby exempt from taxation as contemplated by Section One, Article Nine and Section Sixteen of Article Sixteen of the Constitution of Florida.

Section One of Article Nine of the Constitution authorizes the legislature to provide for a uniform and equal rate of taxation for all property except such as may be exempt for municipal, charitable or other purposes.

Section Sixteen of Article Sixteen of the Constitution provides that the property of all corporations shall be subject to taxation unless held and used exclusively for municipal or charitable purposes.

#### CONSTITUTIONAL LAW - MUNICIPAL CORPORATIONS

(Douthitt, et al. v. City of Covington, et al., Court of Appeals of Kentucky, 144 S. W. (2d) 1025)

The power of slum clearance is to be exercised by a city in cooperation with program of housing commission subject to all of the limitations to which such actions are subjected under the constitution and laws of the state.

Suit by taxpayers of the City of Covington to enjoin the City of



Covington, the Covington Municipal Housing Commission, and others from entering into contracts for slum clearance projects as contemplated by the United States Housing Act of 1937 (42 U.S.C.A., Sec. 1401 et seq.) and Sec. 2741x-1 et seq., Kentucky Statutes, wherein defendants filed a demurrer.

The Court of Appeals of Kentucky affirmed a judgment of the Circuit Court, Kenton County, for defendants after sustaining the demurrer, and held (1) that the power of slum clearance is to be exercised by the city in cooperation with program of housing commission subject to all of limitations to which such actions are subjected under constitution and laws of the state, and (2) that the city of Covington and the municipal housing commission could not be enjoined from executing contracts for slum clearance projects on ground that ordinances and contracts violated "due process of law" where, under statute and ordinances, property holders had protection against unauthorized or arbitrary action and security of compensation.

CONSTITUTIONAL LAW - MUNICIPAL CORPORATIONS -

(Munpower vs. Housing Authority of City of Bristol, et al  
(Supreme Court of Appeals of Virginia, 11 S. E. (2nd) 732)  
The Virginia legislature has authority to create a housing  
authority. The wisdom of such legislation is not for the  
court to determine.

The Supreme Court of Appeals of Virginia sustained a declaratory judgment of the Corporation Court of the City of Bristol.

The complainant, a taxpayer, assailed the organization of the Housing Authority of the City of Bristol and questioned its right to carry out its functions in general. Specifically the bill challenged the right of said Authority to issue bonds, the right of the City Council, by its resolution or ordinance, to authorize the Mayor to appoint members of the Authority, the action of the Mayor in making such appointments, the organization of the Authority, the authority to enter into and the validity of the Cooperation Agreement between the Authority and the City of Bristol, the legality and validity of the two contracts between the Bristol Authority and the United States Housing Authority and the legality and validity of contract between the Bristol Authority and V. L. Nicholson Co., and asked a declaratory judgment as to the validity of the entire "Housing Authorities Law". (Chapter 310, Acts of Assembly 1938, Code Supp. Sec. 3145 (1)-(24) inc.)

The court held that (1) the general assembly had power to create such Authority; (2) the property of such Authority which is created as a "political sub-division" of the commonwealth, is exempt from taxation under Sec. 183 of the Virginia Constitution; (3) the purpose of the Authority is public and the taking of property by it is for a public use; (4) its bonds

are not bonds of the city in violation of Section 127 of the Virginia Constitution; (5) the contract of the city with the Authority is legal and does not bind future members of the City Council in the exercise of their legislative functions in contravention of Section 185 of the Virginia Constitution; and (6) the Housing Authorities Law of Virginia is valid.

STATUTES - CONSTITUTIONAL LAW - EMINENT DOMAIN - MUNICIPAL CORPORATION

(Hogue v. Housing Authority of the City of North Little Rock et al., Ark. \_\_\_\_\_, 144 S. W. (2d) 49)

The Arkansas Housing Authorities Act created a public agency for performance of necessary public purposes. The act authorizing erection of public low-rent housing projects is not unconstitutional as granting "special privileges" to certain citizen or class of citizen.

This suit was brought by a taxpayer against the Housing Authority of North Little Rock, Arkansas, and the mayor and members of the city council of said city to enjoin them from proceeding further under the Housing Authorities Act (No. 298 of the Acts of the Arkansas Legislature of 1937, p. 1074, appearing in Pope's Digest as Sections 10059 to 10088), on the grounds that the act is unconstitutional in its entirety and, if not invalid in its entirety, certain sections thereof are contrary to certain provisions of the constitution of 1874, and should be stricken down leaving only the sections thereof in force and effect which are constitutional and valid.

The Supreme Court of the State of Arkansas affirmed the decree of the Pulaski Chancery Court denying the relief prayed for and held.

(a) that the Housing Authorities Act (supra) creates a public agency for the performance of a public purpose and that insofar as it permits or requires the expenditure of public funds by the state or by municipalities the expenditures are for public use in the promotion of proper governmental functions,

(b) that the Act contains no prohibited delegation of legislative authority and is not unconstitutional on that account.

(c) that the Act is not unconstitutional because it empowered the Authority to exercise eminent domain in acquiring property for public purposes with which to construct and operate housing projects,

(d) that the Legislature may make classification for taxation and for the exercise of a police power and that when the classifications are supported by any reasonable basis they are valid,



(e) that the Act does not authorize an unconstitutional loan or use of municipal credit, nor a misuse of public funds by municipalities,

(f) that the Housing Authority is a public agency and its property is public property devoted to a charitable use and as such the Legislature under the Constitution (which in Section 5 of Article XVI exempts from taxation public property used exclusively for public purposes and buildings and grounds and materials used exclusively for public charity) may exempt it from taxation at the hands of the State or any public body thereof,

(g) that the Act is not void because it does not limit the location of its projects to slum areas, and

(h) that the Act is not discriminatory against private owners of dwelling accommodations and does not take their property for public purposes or uses without due process of law and without a just compensation therefor.

#### HOMESTEAD - HOLC

(Marvin Roberson et ux vs. HOLC, Court of Civil Appeals, Dallas, Texas. Decided in January 1941.)

Effect of recital in deed of trust that indebtedness refinanced was a valid lien - Property in which person lives with his family may not be his homestead - Homestead may be waived, and must be pleaded and proven.

In an HOLC foreclosure suit in Texas the trial court rendered a decree of foreclosure and the mortgagors, Roberson and wife, appealed to the Court of Civil Appeals at Dallas, Texas. That court disposed of the appeal as follows:

"The appeal is predicated on the theory that the trial court, under the doctrine of judicial notice, was compelled to take notice of the provisions of the Act of Congress of the United States, known as the Home Owners' Loan Act of 1933, which created the plaintiff corporation for the purpose of extending loans to home owners, and because of which the property in controversy is presumed, as a matter of law, to have been the homestead of defendants Marvin Roberson and wife, Catha Roberson, prior to the enactment of the law, has been since 1929, and is now the homestead of said defendants; and, under sections 50 and 51, Art. 16 of the Constitution of the State of Texas, and Arts. 3832 and 3839 of the Revised Civil Statutes of Texas, 1925, providing legal means and procedure to perfect a lien against a homestead, the burden was on plaintiff to prove that the lien was created in a manner provided by the Constitution and statutes of Texas. Thus, there being no evidence that the deed of trust lien, which plaintiff sought to foreclose, was

a valid and subsisting lien on the homestead of said defendants, the court could not take judicial knowledge of facts, in effect, that the lien was created in compliance with the statute of Texas, and for a purpose authorized by the Constitution.

"The Home Owners' Loan Act (12 U.S.C.A., secs. 1461, et seq.) was created for the purpose of supplying direct relief to home owners; with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debts elsewhere, and to pay, within limits, any accrued taxes, assessments, necessary maintenance, repairs and incidental costs. The Act expressly provides: '(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed \$20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the state in which the real estate is located, together with the credit instruments, if any, secured thereby.' The national public purpose embodied in the Act is evident, - to afford relief only to home owners, whether a single man or woman, with or without dependents, owning and using real estate in fee simple as a home, or held as a homestead, and to afford benefits to heads of families owning and using property as homes. The law does not contemplate, forsooth, that because the head of a family lives, with his wife and children, on the property, such occupancy ipso facto makes the property his homestead. It is quite possible that the head of a family, owning property and occupying it with his family, may never legally designate it as his homestead; and, again, a legally designated homestead may be the subject of a waiver. It has been held in this state, since the earliest decisions, that 'intention in good faith to occupy is the prime factor' in impressing property with the homestead character. Intention alone, without overt acts of homestead occupancy, cannot give a homestead right; but, at the same time, it is equally true that all other things combined cannot give it, absent the intention to dedicate it to the uses of a home. Homestead exemption is a right conferred by law upon the head of a family, and unless such party avails himself of such right by pleadings and proof, courts cannot assume facts exist against the validity of an existing debt and lien, or that the homesteaders wish to claim the exemption.

"In this case, neither the note nor the deed of trust securing it indicates that the property subject to the indebtedness was defendant's homestead; nor was the homestead character of the property pleaded or proved, or the validity of plaintiff's deed of trust challenged as evading defendants' constitutional rights, or otherwise. Thus, in all legal aspects, the homestead character of the property, if any existed, was effectively waived.



Furthermore, because of said defendants' failure to plead homestead as a defense against plaintiff's cause of action for debt and foreclosure, they were not entitled to introduce proof of the homestead issue. *Benson et al v. Mangum*, 117 S. W. (2d) 169.

"The Home Owners' Loan Act providing for extension of loans and liens on homes and homesteads by the corporate plaintiff, in accordance with the laws of the state in which the real estate is located, raises no presumption that the Corporation, in the exercise of its powers and authority thus granted, committed an ultra vires act; it must be presumed, in the absence of pleadings and proof to the contrary, that the Corporation, in extending loans, duly exercised the powers conferred upon it, and that the debt and loan so extended were valid obligations of the makers, courts cannot arbitrarily declare a note and deed of trust invalid.

"The deed of trust declared upon, signed and acknowledged by both Marvin Roberson and Catha Roberson, recites that, 'The note hereinafter described is secured by a first lien against the hereinabove described property (property in suit), being given in lieu and extension of the following described indebtedness: (then follows a detailed statement of the indebtedness refunded) The grantors herein acknowledge said aforesaid liens to be valid and subsisting liens against the hereinabove described property, and that the payment thereof is expressly requested by the grantors herein to be made by the holder of the note secured hereby, and the holder of the note hereinafter described shall be and is hereby subrogated to all rights, liens, remedies, equities, superior title and benefits held, owned, and enjoyed by the owner or owners of said indebtedness, all of which is hereby acknowledged and confessed. (Next follows a description of the indebtedness involved herein).' We think these admissions by the makers of the note and deed of trust were of such probative force as the court might determine they were entitled to receive; and if, as contended by the defendants, the burden of proof rested upon plaintiff to show that the indebtedness and lien involved in this suit were valid, such admissions of the defendants against their interests justified finding that the liens were valid and subsisting against the property. *Simpson v. Edens*, 38 S.W. 474; *Texarkana Gas & Electric Co. v. Lanier*, 126 S. W. 67; *Thompson v. Moor*, 14 S.W. (2d) 803; *Trice v. Bridgewater*, 81 S.W. (2d) 63. The defendants offered no proof that the property involved was their homestead. Indeed, defendants elicited testimony as to their residence, marital and family status and possession of the property involved; but, on objection to this testimony as being immaterial, absent pleading of homestead, said defendants' attorney limited its purpose, expressly stating, 'I just want to know where he (defendant Roberson) lives and how long he has lived there \* \* \* that all necessary parties are before the court that are in possession of this property.' It will thus be seen that the defendants offered such evidence for a purpose other than as proof of homestead. i. e., to show that all necessary parties were before the court - an issue not in controversy. The court did not err in excluding the proffered testimony.

The judgment of the court below is affirmed."

HOMESTEAD

(Biebel Roofing Co., Inc. v. Pritchett et ux., Appellate Court of Illinois, 30 N. E. (2d) 196)

Plaintiff, having combined claims for attorneys' fees and balance due on a note, and having proceeded to a sale of the property under judgment, failed to come within exceptions provided in Illinois statute that no homestead property shall be exempt from sale for debt incurred for improvement thereof. Under these circumstances defendant was not deprived of his homestead rights.

Plaintiff, pursuant to a written contract with defendant, put a new roof on his house. To evidence such indebtedness defendant, at the time of executing the contract, also executed and delivered to plaintiff a judgment note payable in installments without interest, but containing the usual provision for allowance of a reasonable attorney fee to the holder thereof in the event of the entry of judgment.

Defendant defaulted in his payments and plaintiff obtained in the circuit court a judgment by confession on such note against defendant. In such judgment was included \$25 as attorney fees. Thereafter, by virtue of an alias execution issued on such judgment, the sheriff levied on and sold the real estate in question to plaintiff, and after time for redemption had expired issued a deed conveying said real estate to plaintiff. No attempt was made at any time by defendant to set off the homestead.

After defendant's refusal to give plaintiff possession, the plaintiff instituted an action of forcible entry and detainer against the defendant and his wife. On appeal, the circuit court entered judgment in favor of defendants, and plaintiff brought this appeal to review such judgment. In affirming the decision of the lower court in holding that plaintiff was not entitled to possession of the property the Court said:

"The right of homestead is based on Section 1 of Chapter 52 of our statutes, which provides, so far as is material, that every householder having a family, shall be entitled to an estate of homestead, to the extent in value of \$1,000, in the lot of land and buildings thereon, owned or rightly possessed and occupied by him or her as a residence, and that such homestead, and all right and title therein, shall be exempt from levy or execution or sale for the payment of his debts or other purposes 'except as hereinafter provided.' Section 3 of the same statute provides that no property shall by virtue of such act be exempt from sale for \* \* \* a debt or liability incurred for the \* \* \* improvement thereof."

"Plaintiff contends that the debt or liability for which the property was so sold was incurred for the improvement of the real estate and that therefore the homestead in such real estate was not exempt from the sale in question.



With this contention we cannot agree. The original debt for the improvement was \$150 evidenced by the note. This debt was reduced to \$101 before judgment. Judgment was not rendered and the property was not sold for this debt of \$101, but there was included in the judgment \$23 as attorney fees, which fees were no part of the original debt so incurred for the improvement of the real estate. Attorney fees are not embraced within the exceptions in said Section 3 for which a homestead may be subjected to forced sale.

\* \* \* \* \*

"In the instant case the sale, as we have pointed out, was held under a judgment which was based on a contingent liability for attorney fees under the note as well as a fixed liability or debt for the improvement. The plaintiff, having combined both claims against the defendant Samuel Pritchett in a single judgment and having proceeded to a sale under the judgment, has failed to bring its rights within the exceptions provided in Section 3. The sheriff's sale and deed, under these circumstances, did not deprive said defendant of his homestead rights, which rights included the right to remain in possession of the premises until such homestead was legally divested."

#### BUILDING AND LOAN ASSOCIATION -- LIQUIDATION --

(Griffith v. Daylight Savings Building & Loan Ass'n., Superior Court of Penn., 16 A. 2d 635)

A plan of a building and loan association, which was in course of voluntary liquidation, to convey to shareholder, when requested, real estate in exchange for his unencumbered matured stock violates the fundamental principle which requires a fair and equal distribution to all shareholders.

The defendant building and loan association, after going into voluntary liquidation, adopted a plan for decreasing its liabilities by conveying to a stockholder, when requested, real estate in exchange for his matured stock. The plan was approved by an examiner of the Banking Department, but the Banking Department did not approve the plan and the association ceased the practice.

The plaintiff requested defendant to convey to him real estate in cancellation of his stock at the book value of such real estate or at the actual value thereof, whichever amount was higher, but this request was refused. Plaintiff then filed this bill in equity to compel the association to convey real estate to him in exchange for his stock. An answer was filed admitting the facts in the bill and asking for a determination of the rights of the parties. The chancellor dismissed the bill and the exceptions filed to his decree were overruled by the court below. This appeal was then taken. The court in affirming the decision of the court below said:

"There is no provision in the law that expressly prohibits a building and loan association from following the procedure heretofore adopted by the defendant in reducing its stock liability, but, on the other hand, there is no law that compels an association to do so. While there may be some advantages to the shareholders in being relieved of any obligations which accrue by reason of the association's holding real estate and such a course would no doubt serve to facilitate defendant's liquidation, due regard must be given to the interest of the shareholders of a building and loan association, as they have an equal status in the winding up of the affairs of an association. No shareholder should be permitted to obtain advantage over others occupying the same relationship: *Sharp v. Homer Building & Loan Association*, 111 Pa. Super. 556, 170 A. 353; *Rosenblatt et al. v. Potential Building & Loan Association*, 110 Pa. Super., 466, 169 A.24; *Stone v. New Schiller Building & Loan Association et al.*, 302 Pa. 544, 153 A. 753.

"Equity demands that shareholders in an association be treated with equality. When a plan of distribution of the assets will result in a preference to some it cannot be enforced unless it has received the affirmative consent of all shareholders. Under the scheme advanced by appellant, in view of the character of the assets of the association and the depressed condition of the real estate market, there is no assurance of a fair and equal pro rata distribution to the shareholders. Some, especially those having small holdings, may not wish or be able to become owners of real estate. The assets are not of a character that may be apportioned in kind to the shareholders according to their interest. Moreover, the real estate not exchanged may have to be sold at a great sacrifice, which would be prejudicial to those to whom real estate was not conveyed.

"The chancellor very aptly states: 'But however attractive such a proposal may appear as a means of facilitating final liquidation and dissolution of defendant association, this court, in the absence of the consent of all shareholders, cannot lend its support to a method of distribution which violates the fundamental rule that any distribution in liquidation, in the absence of an express agreement by all shareholders to the contrary, must be pro rata as to amount and equal in time.'"

#### COVENANTS - RESTRICTIONS - ALIENATION OF PROPERTY

(*Meyer V. Stein*, Court of Appeals of Kentucky, 145 S. W. 2d 105)  
Restrictions upon the free alienation of property are not favored by the law and are usually strictly construed against those seeking to enforce them. Restrictive covenants are not destroyed by action of a zoning commission.

The Highland Realty Company opened a subdivision in Louisville which was divided into 47 lots. It was in an excellent neighborhood and the build-



ing restrictions converted the property into a high-class residential district. The restrictions in the deeds were numerous but stated mostly that the residences constructed on the lots were to cost not less than \$5000, etc. It appears that lots Nos. 26 and 27 did not recite some of the restrictions stated in other deeds. The city of Louisville passed a zoning ordinance which included these two lots in the commercial district. The present owner of lots Nos. 26 and 27 entered into a contract with Herman Meyer to sell him the property, provided that the property could be conveyed to him free from restrictive covenants and he could use the house on lot No. 27 as a funeral home. Meyer advertised he was purchasing the property for use as a funeral home and the owners of surrounding homes in the subdivision, Windsor Place, instituted a suit in equity seeking to enjoin the owner from selling the property free from the restrictive covenants and to enjoin Meyer from using same as a funeral home. The chancellor granted the injunctions and his judgment upheld the building restrictions. In affirming this judgment the Court of Appeals said:

"Restrictions upon the free alienation of property are not favored by the law and are usually strictly construed against those seeking to enforce them. This rule applies to building restrictions. However, if building restrictions are reasonable, they are uniformly enforced by courts and are given the effect intended by the parties as gathered from the conveyance in the light of surrounding circumstances, *Anderson v. Henslee*, 236 Ky. 465, 11 S.W. 2d 154; *Glenmore Distilleries Co. v. Fiorella*, 273 Ky. 549, 117 S.W. 2d 173; *Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W. 2d 1024. Windsor Place is an exclusive residential district where handsome and expensive homes have been built and the record shows many of the persons who bought, or erected, homes there did so because of the building restrictions.

"It is argued by appellants that the restrictions relate only to the building of the homes and place no limitation upon their use after they are once constructed in conformity with the restrictions, citing *Holliday v. Sphar*, 262 Ky. 45, 89 S.W.2d 527. In the *Holliday* case the covenants in the deed forbade the building of any dwelling nearer than 25 feet to the pavement line and provided the cost thereof was not to be less than \$3,500. There, we held such covenants only dealt with the minimum cost of the dwellings and fixed the distance they were to be located from the street, and entirely failed to restrict the use of the property to residential purposes. But the covenants in the deeds to lots No. 26 and No. 27 are much broader and more definite than those in the *Holliday* case. They limit the use of these lots to a single residence and provide the exteriors must be constructed of brick, brick veneer, concrete, stone or stucco; with a roof of tile, shingle tile, asbestos, or slate. Then follow the restrictions as to outbuildings; fences; the grade of the lots; and the deed conveying lot No. 27 (whereon is located the house in controversy), as well as in the deeds conveying 51 other lots in this subdivision, there is a covenant that the grantor 'will restrict all its other lots in said subdivision, fronting on Windsor Place for residence purposes only'.

"No one can read the restrictive covenants in the deeds conveying this property and escape the conclusion that it was the intention of the parties to, and they did, limit the use of the property to residential purposes. If we should accept appellant's argument that such covenants related only to the building of the homes, and placed no limitation upon their use after they were once constructed in conformity with the restrictions, then building restrictions would render the owners of property no benefit and parties incorporating such restrictive covenants in their deeds would be doing a vain thing.

"We are firmly of the opinion that the covenants in the deeds conveying the lots in question limit the use of the property to residential purposes with the exception of the back part of lot No. 26 where an apartment may be built fronting on Bardstown Road, the lower floor of which may be used for offices or storerooms. Therefore, we are constrained to hold these covenants excluded the use of the residence on lot No. 27 as a funeral home, since it cannot be denied that a funeral home is a commercial enterprise. Appellants could only hope to establish a funeral home on this property in view of the action of the city zoning commission designating the corner where the property is located as lying within the commercial district. But such action by the zoning commission does not have the effect of destroying the restrictive covenants. *Ludgate v. Somerville*, 121 Or. 643, 256 P. 1043, 54 A.L.R. 837; *Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W. 2d 1024."

TAXATION - BANKS AND BANKING - UNEMPLOYMENT COMPENSATION -  
(Western Bank & Trust Co. v. Atkinson, - - - Ohio - - -,  
30 N.E. (2d) 341)

A privately organized and owned corporation for profit, exist-  
ing under and by virtue of the statutory law of Ohio and con-  
ducting a general banking and trust business in that state,  
does not ipso facto become an instrumentality of the United  
States by reason of incidental, voluntary membership in the  
Federal Reserve System.

The plaintiff brought this action against defendant, Administrator of the Bureau of Unemployment Compensation, for a declaratory judgment holding plaintiff exempt from the provisions of the Ohio Unemployment Compensation Act. A judgment for plaintiff was reversed and judgment for defendant entered by the Court of Appeals. Plaintiff appealed and the Supreme Court of Ohio affirmed the decision of the Court of Appeals.

The plaintiff is a privately organized and owned Ohio corporation engaged in a general banking and trust business for profit. It is also a voluntary member of the Federal Reserve System. By virtue of this membership it asked for a declaratory judgment holding it exempt from the provisions of the



Ohio Unemployment Compensation Act. The decision of the Ohio Supreme Court is as follows:

"The answer to the single question requiring the attention of this court is found in Section 1345-1c (E) (4), General Code, which reads in part as follows:

"(E) The term employment shall not include: \* \* \*

"(4) Service performed in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of purely governmental functions.'

"Is the plaintiff an 'instrumentality of the United States' by reason of the sole fact that it is a voluntary member of the Federal Reserve System? If so, it is exempt from payment of the assessments, required by the Unemployment Compensation Act; otherwise the plaintiff must pay the assessments, and its employees will be entitled thereby to the benefits of the act.

"Without attempting to formulate a rigid definition of the term 'instrumentality of the United States,' as employed in Section 1345-1c (E) (4), General Code, this court experiences little difficulty in reaching the unanimous conclusion that the plaintiff fails to answer that description. It is a privately organized and owned corporation, existing under and by virtue of the statutory law of this state alone. Its authorized purpose is the conduct of a general banking and trust business in this state for profit to its shareholders. Under these circumstances the usual presumption of taxability clearly would apply. However, the plaintiff contends that the additional circumstances of voluntary membership in the Federal Reserve System ipso facto transforms its essential character into that of an instrumentality of the United States. That no such importance attaches to this incidental feature is apparent upon a study of the petition.

"Numerous cases are cited in the briefs, but counsel cannot agree that any one of them is exactly in point.

"Since this court is of the opinion that the plaintiff is not an instrumentality of the United States, no question of constitutionality arises.

"The judgment of the Court of Appeals sustaining the defendant's demurrer to the plaintiff's petition is hereby affirmed."

CONTRACTS - MORTGAGES - HOLC

(Local Federal Savings and Loan Ass'n. of Oklahoma City v. Harris, - - - Okla. - - -, 107 P. (2d) 1012)

Where the Home Owners' Loan Corporation refunded mortgage indebtedness without knowledge that the creditor was taking from the debtor a second mortgage for the difference between the proceeds of the loan and the amount of the debt refunded, such second mortgage is invalid and unenforceable.

This appeal involves the validity of a second mortgage taken by a building and loan association for the difference between a Home Owners' Loan Corporation loan and the full amount of the mortgage indebtedness in the refinancing of a mortgage on the home owner under the provisions of the Home Owners' Loan Act. The sole question presented here is whether or not the second mortgage is valid and enforceable. In holding that the second mortgage was null and void the court said:

"Although the question is new in this jurisdiction, there is no lack of authority on this point. In 110 A.L.R. 250, appears the following note: 'Agreements between a mortgagor and mortgagee looking to a reimbursement of the latter for any loss suffered by reason of a refinancing of an indebtedness under the Home Owners' Loan Act are held invalid as a violation of the spirit and purpose of that act. Cook v. Donner / 145 Kan. 674, 66 P. 2d 587, 110 A. L.R. 244\_/; Stager v. Junker (1936) 183 A. 440, 14 N.J.Misc. 913; Jessewich v. Aboene (1935) 154 Misc. 768, 277 N.Y.S. 599; First Citizens Bank & T. Co. v. Speaker (1936) 159 Misc. 427, 287 N.Y.S. 331.'

"In the case of Cook v. Donner, 145 Kan. 674, 66 P.2d 587, 588, 110 A.L.R. 244, it was held: 'Where a mortgagee at the same time or after he executes to the Home Owners' Loan Corporation a release of all his claims against his debtor, and receives a less amount in bonds from the corporation making the loan to the debtor, agrees secretly or otherwise with the debtor that the debtor will give him a note and second mortgage on the property to cover the loss he has sustained in making the release, such agreement is in violation of the spirit of the act and rules under which the release was made, it denotes bad faith, is against public policy, and the note and mortgage so given are null and void.'

"The question was before the Supreme Court of California in the case of McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 915, 125 A.L.R. 800, wherein a set of facts similar to the facts involved herein was presented and wherein it was held that such a second mortgage was void. \* \* \* \*

"All these authorities were reviewed by the Ohio court in the case of Dayton Mortgage & Investment Company v. Theis, 62 Ohio App. 169, 23 E.E. 2d 511, wherein it was held:



"Where a mortgagee agrees to accept bonds of the Home Owners' Loan Corporation in part settlement of the mortgage, debt, and where full disclosures are made, and in the absence of fraud, secrecy, duress and collusion, the mortgagor may contract with the mortgagee to take care of the difference between the total amount due and the face value of the bonds, subject only to the limitations of the Home Owners' Loan Act, 12 U.S.C.A. section 1461 et seq.

"Where the administrators of the Home Owners' Loan Corporation are not advised of such independent contract and the mortgagee has agreed to accept the bonds in full settlement of his claim, such contract is thereby rendered void as against public policy."

ADMINISTRATIVE ORDERS, REGULATIONS and OPINIONS

NATIONAL DEFENSE HOUSING - THE PRESIDENT - EXECUTIVE ORDER NO. 8632:

## Coordination of National Defense Housing.

By virtue of the authority vested in me as President of the United States by the Constitution and the statutes, in order to define further the functions and duties of the Office for Emergency Management of the Executive Office of the President with respect to the national emergency as declared by the President to exist on September 8, 1939, and for the purpose of providing for the effective discharge of responsibilities imposed upon me by the statutes mentioned in paragraph 1, and for assuring proper coordination of all defense housing activities, it is hereby ordered as follows:

1. The term "defense housing" as used in this order shall include all housing authorized by:

(a) United States Housing Act of 1937, approved September 1, 1937 (50 Stat. 888), as amended, so far as projects developed under the authority of this Act relate to national defense activities.

(b) Title II of the Act of June 28, 1940, 54 Stat. 673, 681.

(c) Second Supplemental National Defense Appropriation Act, 1941, approved September 9, 1940 (Public No. 781, 76th Cong.).

(d) Act of June 11, 1940, 54 Stat. 265 (including housing authorized by allocations from emergency funds available under such Act).

(e) Act of June 13, 1940, 54 Stat. 350 (including housing authorized by allocations from emergency funds available under such Act).

(f) Act of October 14, 1940, Public No. 849, 76th Congress.

2. The term "Federal housing agency" as used in this order shall include all executive departments and independent agencies, including corporations in which the United States owns all or a majority of the stock, either directly or indirectly, which:

(a) Plan, construct, or operate defense housing facilities.

(b) Grant loans or subsidies for public housing purposes.

(c) Encourage or assist the financing or construction of private housing.



(d) Conduct surveys or analyses of housing conditions and housing markets.

3. There is hereby established within the Office for Emergency Management of the Executive Office of the President, a Division of Defense Housing Coordination at the head of which there shall be a Coordinator of Defense Housing appointed by the President. The Coordinator of Defense Housing, hereinafter referred to as the Coordinator, shall perform his duties and functions under the direction and supervision of the President and shall report to the President through the Liaison Officer for Emergency Management. The Coordinator shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties.

4. Subject to such policies, directions, and regulations as the President may from time to time prescribe, the Coordinator, in cooperation with all departments and agencies which have responsibilities for defense activities, and utilizing the services and operating facilities of Federal housing agencies to the maximum, shall perform the following duties and responsibilities:

(a) Establish and maintain liaison between the several departments and establishments of the Government and such other agencies, public or private, as the Coordinator may deem necessary or desirable, to facilitate proper coordination of, and economy and efficiency in, the provision of housing facilities essential to the national defense.

(b) Anticipate the need for housing in localities in which persons are engaged, or are to be engaged, in national defense activities; analyze reported defense housing needs; coordinate studies and surveys of Federal housing agencies in areas of national defense activity; and facilitate the full use of existing housing accommodations.

(c) Formulate and recommend to the President coordinated defense housing programs with the objective of avoiding shortages, delays, duplication and overlapping in defense housing; and advise each Federal housing agency of its part in each proposed program.

(d) Facilitate the execution of approved housing programs through private industry or through appropriate governmental agencies and take appropriate steps to eliminate obstacles which impede the expeditious provision of defense housing.

(e) Advise with private and Federal agencies in the formulation of plans, terms, rental and management policies, and other factors in-

volved in developing and operating approved defense housing projects.

(f) Keep continuously informed of the progress of the defense housing program, and report regularly thereon to the President and to the several interested departments and agencies.

(g) Review proposed or existing legislation relating to or affecting defense housing activities and recommend such additional legislation as may be necessary or desirable to assure the effective and expeditious provision of adequate housing facilities for persons engaged, or to be engaged, in national defense activities.

(h) Perform such other duties relating to the coordination of defense housing as the President may from time to time delegate.

5. Within the limits of such funds as may be appropriated to the Division of Defense Housing Coordination, or as may be allocated to it by the President through the Bureau of the Budget, the Coordinator may employ necessary personnel and make provision for the necessary supplies, facilities, and services. However, the Division of Defense Housing Coordination shall use insofar as practicable such statistical, informational, fiscal, personnel, and other general business services and facilities as may be made available through the Office for Emergency Management or other agencies of the Government.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,

January 11, 1941

(See Federal Register, Vol. 6 No. 9, Jan. 14, 1941)

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REGULATIONS GOVERNING DEFENSE HOUSING COORDINATION: Pursuant to the Executive Order of January 11, 1941, entitled "Coordination of National Defense Housing," the following regulations are prescribed in the interest of effective coordination of national defense housing.

1. The definition and use of the terms "defense housing," "Federal housing agency," and "Coordinator" contained in the above mentioned Executive Order of January 11, 1941 shall also apply to these terms as used in these regulations.

2. All defense housing programs or projects requiring certification, approval, allocation of funds, a finding, or other



action by the President as prescribed by any of the statutes mentioned in paragraph 1 of the Executive Order of January 11, 1941, mentioned above, or in any statute now or hereafter enacted relating to the provision of housing for persons engaged in national defense activities, shall, prior to presentation to the President, be submitted by the Federal housing agency concerned to the Coordinator for his review and recommendation. The recommendations of the Coordinator shall cover all items to be determined by the President under the legislation pursuant to which such defense housing is being provided and shall further cover the relationship of such housing to the defense housing program of the Government, method of financing, agency to be utilized, character of the project, development, operation, and management plans, and such other considerations relating to the coordination of the defense housing program as may be pertinent. All submittals to the President as required by the above mentioned statutes shall be accompanied by the recommendations of the Coordinator. Any revisions in such defense housing projects effected subsequent to review and clearance by the Coordinator substantially changing the scope and character of the original project shall be reported to the Coordinator, who shall advise the agency concerned of the effect of such changes upon the coordinated defense housing program.

3. Each Federal housing agency shall promptly furnish to the Coordinator for his review and recommendation the standards which it has established, or which it proposes to establish or revise, for the development, operation, and management of defense housing projects with respect to:

(a) Physical characteristics, including standards of design, construction, site selection, amenities,, and community facilities.

(b) Labor standards.

(c) Standards of occupancy, operation, and management including rent levels and policies.

Any Federal housing agency submitting a proposed defense housing project to the Coordinator for his review and recommendation, as set forth in paragraph 2, shall certify that the standards established for such agency have been or will be complied with except as the project proposal may indicate.

4. In order to coordinate site acquisition for defense housing purposes, all proposed site locations under consideration for defense housing projects shall be reported to the Coordinator by the Federal housing agency concerned. The Coordinator shall advise such agency of the relationship of its proposed sites to other actual or proposed defense housing sites in the same locality.

5. Each Federal housing agency shall furnish to the Coordinator

copies of such available housing surveys and reports and such other available information and data relating to housing needs and housing markets as he may request; and shall cooperate with the Coordinator in obtaining and developing additional information necessary to a determination of the amount and character of defense housing needs.

6. Each Federal housing agency shall keep the Coordinator advised reasonably in advance of all proposed housing surveys and investigations relating to housing conditions and the housing market in any locality where the defense program has or is expected to have a significant effect on the need for housing. The Coordinator shall advise each agency of the correlation of its proposed survey and investigation activities with other surveys and analyses completed or in progress in the same locality.

7. Each Federal housing agency shall promptly furnish to the Coordinator, at his request, such reports with respect to its activities and the progress of its program as may be necessary in coordinating and expediting the financing, construction, and operation of public and private housing facilities.

8. The Coordinator shall furnish to the Director of the Bureau of the Budget such information and reports with respect to the planning, development, and progress of the Government's defense housing program, in such form and at such times, as the Director may require.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE

January 11, 1941

(See Federal Register, Vol. 6, No. 9, Jan. 14, 1941.)

NATIONAL DEFENSE HOUSING: (9 L.W. 2400) Discrimination in hiring is forbidden. Under authority of Section 11 of the Act of Oct. 14, 1940 (Public No. 349, 76th Congress), the Federal Works Administrator issues the following regulation:

"There shall be no discrimination by reason of race, creed, color or political affiliations in the employment of persons, qualified by training and experience, for work in the development of defense housing at the sites thereof."

Order of Administrator, Jan. 6, 1941.



FARM CREDIT ADMINISTRATION: The Governor, by order filed January 22, provided for the fixing of interest rates by the Federal land banks on divided loans. See 6 Fed. Reg. 564.

The Director of the Regional Agricultural Credit Division, by order filed January 31, prescribed the rules and regulations for the extension of credit by the Wenatchee Branch of the RACC of Salt Lake. See 6 Fed. Reg. 705-6.

FARM SECURITY ADMINISTRATION: The Administrator, by order filed January 21, designated the localities in Tuscola County, Michigan, in which loans may be made under Title I of the Bankhead-Jones Act. See 6 Fed. Reg. 555.

FEDERAL HOME LOAN BANK BOARD: Home Owners' Loan Corporation: The Treasurer, by order filed January 21, amended the accounting procedure with respect to the sale of non-expendable or expendable property. See 6 Fed. Reg. 565.

The General Manager and General Counsel, by orders filed January 21, provided for: (1) the disposal of obsolete forms; and (2) for competitive bidding and for the place of payment in sales of non-expendable and expendable property. See 6 Fed. Reg. 565-6.

The General Manager and General Counsel, by orders filed January 31, provided: (1) for the handling of withdrawals from foreclosure; and (2) for waivers of the establishment of a tax and insurance account. See 6 Fed. Reg. 744-5.

RURAL ELECTRIFICATION ADMINISTRATION: The Administrator, by order filed January 28, allocated funds to designated projects in Arkansas, Illinois, Kentucky, Louisiana, Michigan, Nebraska, New Mexico, Ohio, Oklahoma, Tennessee, and Texas. See 5 Fed. Reg. 659.

The Administrator, by order filed February 3, allocated funds to designated projects in Illinois, Iowa, Missouri, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. See 6 Fed. Reg. 762.

LEGISLATION

STATEProposed Bills:COLORADO - SB 100 (Mr. Veltri)

To authorize housing authorities to undertake until December 31, 1943, the development or administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities. The authorities are authorized to cooperate with or act as agents of the Federal government in the construction or operation of any such project.

IOWA - HB 194 (Mr. McFarlane)  
SB 162 (Mr. Shaw)

To authorize establishment of housing assessment districts in cities having a population of 15,000 or more. The city councils of such cities may establish districts in which housing projects are to be constructed. Provision is made for the alteration, removal, repair, and improvement of unsanitary and unsafe dwellings, apartments and tenements. Provision is also made for sewer and water facilities for homes and the assessment and collection of the costs and expenses of such improvements.

MONTANA - HB 107 (Mr. Gebhardt)

To amend the housing authorities law (Sections 5309.1 - 5309.36 Rev. Code of Montana 1935) to add another section so that, if, after the lapse of two years from the creation of a housing authority, no housing project has been commenced and no contract has been signed by the council and the mayor on behalf of the municipality with the authority of the United States, providing for contributions by the municipality, or tax remission, or aid in support of such project, the housing authority may be dissolved. Procedure is established for the dissolution of such housing authority.

HB 1005 (Mr. Ragon and Mr. Odell)  
SB 732

To authorize housing authorities to undertake until December 31,



1943, the development or administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities. The authorities are authorized to cooperate with or act as agents of the Federal government in the construction or operation of any such project.

Laws Enacted:

NEVADA - AB 80

(Mr. Farndale)

To provide that bonds and other obligations issued by any public housing authority or agency in the United States, when secured by a pledge of annual contributions to be paid by the United States government, shall be security for public deposits and negotiable and legal investments for the state and public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, investment companies, and other persons carrying on a banking business, all insurance companies, insurance associations, and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees, and other fiduciaries.

AB 89

(Mr. Farndale)

To authorize housing authorities to undertake development and administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in defense activities. Such projects may be undertaken until December 31, 1943. The housing authorities are authorized to cooperate with and act as agents of the Federal government in the development and administration of such projects and may acquire or lease such projects. Public bodies are authorized to assist such projects and housing authorities and cooperate wherever necessary.

AB 90

(Mr. Farndale)

To authorize cities, towns, counties, and other public bodies and subdivisions to aid housing projects of housing authorities or of the United States by conveying or dedicating property, by furnishing parks, playgrounds, streets, water, sewers, drainage, and improvement facilities, and by the purchase of bonds of housing authorities. Municipalities may make necessary agreements with the housing authorities relative to the furnishing of such aid. The municipalities may also make agreements respecting the exercise of their powers relating to the remedying or elimination of unfit dwellings, and may make agreements relative to payments by housing authorities for municipal services or taxes.

## AB 81 (Mr. Farndale)

To create housing authorities as corporate public bodies for the purpose of undertaking slum clearance and projects to provide dwelling accommodations for persons of low income in urban and rural areas. Such authorities are to be established in cities having a population of more than 5,000 and in counties. The powers of the authorities include the acquisition of property, borrowing money, issuing bonds and other obligations, giving security therefor, and other powers necessary to carry out the purposes of the Act. The property and securities of such authorities are to be exempt from taxation and assessment but payments in lieu of taxes are authorized.

WASHINGTON - SB 166 (Mr. Haddon)

To declare valid and legal the creation, establishment, and organization of housing authorities under the provision of the housing authorities law (Laws 1939, Ch. 23) and any Acts or proceedings under the authority of that Act. Notwithstanding any defect or irregularity or want of statutory authority, the contracts and obligations of such housing authorities heretofore entered into relative to financing or aiding in the development of housing projects are hereby validated.





















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